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IN THE

Supreme Court of the United States

OCT. TERM, 1971

NO. 71-387

THE HERALD COMPANY, ET AL.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

BUILDING SERVICE EMPLOYEES
INTERNATIONAL UNION,
LOCAL NO. 200, AFL-CIO
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Miscellaneous:

Rosenberg, Robert M., *Profits from Franchising*, McGraw-Hill, New York (1969) 16, 26

Thompson, Donald N., *Franchise Operations and Antitrust*, Heath, Lexington, Mass. (1971) 18

Slater, David B., "Some Socio-Economic Footnotes on Franchising," *Boston University Business Review*, Summer, 1964 25

Eastland Bill [Franchise Distribution Act of 1967], S. 2507, 90th Cong., 1st Sess. (1967) 28

Hart Bill [Fairness in Franchising Act of 1969], S. 1967, 91st Cong., 1st Sess. (1969) 28

Hart Bill [Fairness in Franchising Act of 1971], S. 2472, 92nd Cong., 1st Sess. (1971) 28

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Herald Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on July 2, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra,* pp. 3a-17a) is not yet reported. The Decision and Direction of Election of the Regional Director for the Third Region of the National Labor Relations Board, the relevant portion of the Trial Examiner's Decision, and the Decision and

Order of the National Labor Relations Board (reported at 181 N.L.R.B. No. 62) are also set forth in the Appendix (pp. 18a-32a).

JURISDICTION

The judgment of the Court of Appeals (App., *infra*, pp. 1a-2a) was entered on July 2, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966).

QUESTIONS PRESENTED

1. Whether the common law "direction and control" test, traditionally used by the NLRB to determine employee versus independent contractor status within the meaning of Section 2(3) of the Labor Management Relations Act, 29 U.S.C. § 152(3) (1965), can ever be applied to franchisees, so as to give the Board jurisdiction over persons who have substantial proprietary interests in their businesses and who depend for income upon reselling, at a profit, goods whose title has passed to them.

2. Whether the result reached by the Court of Appeals for the Second Circuit in the present case is in conflict with the decisions of the Court of Appeals for the Fourth Circuit in *N.L.R.B.* v. *A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964), the Court of Appeals for the Ninth Circuit in *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970), and the Court of Appeals for the Seventh Circuit in *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F.2d 180 (7th Cir. 1967).

STATUTE INVOLVED

Section 2(3) of the Labor Management Relations Act, as amended, 29 U.S.C. § 152(3) (1965) provides:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

STATEMENT

Petitioner, a New York corporation, publishes two daily newspapers and a Sunday paper for circulation in Syracuse, and in central New York State. In 1947, petitioner adopted a franchise system for the distribution of its newspapers, entering into written contracts with its various classes of distributors, namely, motor route distributors (including suburban and country distributors), city distributors, and street sales distributors. Motor route distributors, either alone or through carrier boys, deliver to subscribers in rural areas; city distributors own or rent stations from which they distribute to carrier boys for delivery to subscribers in Syracuse and the immediate surrounding

area; and street sales distributors deliver to news dealers such as drugstores and newsstands operators (App. 34a). There are approximately eighty-three motor route and suburban distributors, twenty-three city distributors and five street sales distributors (App. 34a).

A. *The Franchise Agreements.*

The written franchise agreements in effect since 1965, all containing minor variations because of the differing physical circumstances of distribution, are in all critical respects, identical (A. 1907, 2345-2367).[1]

These businesses which run for terms of from five to seven years, open with recitations as to the nature of the respective business of petitioner and distributor, and state that distributor, with his own office and transportation facilities and his own employees, desires to sell newspapers within a specified geographical territory defined in the agreement (A. 2369). The exclusive right of the distributor to sell and distribute within the designated territory continues so long as the distributor "* * * shall fully perform the obligations * * *" set forth in the contract (A. 2370). A sufficient number of newspapers is to be purchased and distributed so as to service all customers within the designated territory (A. 2370). The distributor is solely responsible for the expenses of the distribution operations, including social security taxes, workmen's compensation, and so forth (A. 2370).

The wholesale rate at which the distributor purchases newspapers from petitioner is set forth in a schedule at-

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[1] References to the appendix, printed for use in the court below and filed with this petition, are shown as "A." References to the appendix to this petition are shown as "App."

tached to the contract; the retail price of the newspapers is established by petitioner (A. 2370). If the retail price is increased, petitioner may increase the wholesale price but in no event will such increase result in a cash difference between the wholesale and retail price which is less than the amount fixed by the agreement at the time of its execution (A. 2370).

The distributor undertakes to make every effort to increase circulation by securing new subscribers and petitioner reserves the right to conduct sales promotion programs from time to time, supplying the distributor with information as to such programs. Where promotional devices conducted by petitioner involve payments or applications by said subscribers, such as the sale of insurance or magazines, the distributor is obligated to collect the payments or applications from subscribers within his territory whenever they are due (A. 2371). The distributor retains the right to sell and distribute other newspapers and publications within the designated territory (A. 2371). The distributor undertakes to deliver complete newspapers at a reasonable hour on Sunday morning and at reasonable hours with respect to daily publications; he agrees to take delivery of newspapers at places designated by petitioner and undertakes to deliver complete newspapers to subscribers, including supplements and inserts (A. 2371).

The distributor deposits with petitioner a sum of money equal to the largest amount billed in two consecutive weeks as a bond to be repaid to distributor upon termination of the agreement (A. 2372).

The distributor is authorized to sell, assign or transfer the rights under the agreement, subject to a right of first refusal by petitioner upon thirty days' notice. The thirty

days' notice is to state the name and business address of the party to whom the offer is made, the price named in the offer, and the wholesale price then being paid by the distributor. If petitioner elects to purchase, it does so on the terms stated in the notice. If petitioner fails to exercise its right of first refusal, the proposed sale is completed (A. 2372).

The distributor pays on Wednesday of each week for the week's deliveries and furnishes to petitioner quarterly reports of circulation including the names and addresses of all subscribers within the assigned territory for the purpose of furnishing data for the "Audit Bureau of Circulation" (A. 2373).

The distributor is obligated to keep in force such policies of insurance as required by law and as usual and customary for distributor's trade or business. In the event of the distributor's insolvency, petitioner may, at its option, cancel the agreement upon twenty-four hours' notice (A. 2373).

The agreement provides for arbitration of disputes between distributor and petitioner, names an arbitrator to represent each party to the agreement with power to select a third, and sets forth a procedure in the event the arbitrators fail to agree (A. 2373-2374).

The agreement recites that the means and methods of collection, delivery and distribution of newspapers within the assigned territory shall be in the exclusive control of the distributor and not subject to control or supervision by petitioner and that the distributor occupies the position of an independent contractor. The agreement further speci-

fically states that the distributor is not required to perform personally the obligations under the contract (A. 2374). The distributor expressly agrees that petitioner is in no way responsible for distributor's use of vehicles in the performance of the contract, either as to maintenance or obligation to pay for damages caused by such vehicles (A. 2374).

B. *The Representation Hearing.*

During 1965, the distributors formed an organization known as the Newspaper Distributors Association which described itself as "* * * neither a union nor a protection organization * * *" but as a group "* * * of independent businessmen * * *" for the purpose of negotiating disputed points with petitioner (A. 2208). In 1966, this association affiliated itself with Local 200 of the Building Service Employees International Union, AFL-CIO, and, on June 27, 1966, a representation petition was filed. The hearing on the representation petition took twenty-eight days and approximately 3,000 pages of testimony and exhibits were adduced, the bulk of which dealt with the status issue raised by petitioner. On July 19, 1967, the Regional Director for the National Labor Relations Board's Third Region issued his Decision and Direction of Election, holding that the distributors were employees of petitioner within the meaning of Section 2 (3) of the Labor Management Relations Act (App. 50a).[2]

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[2] The Regional Director denied petitioner's motion that the hearing officer make credibility determinations on the ground that representation proceedings are "***investigations which are informal and non-adversary***." (App. 33a).

A most significant aspect of this decision is its total failure specifically to mention critical facts bearing on the status of the distributors. When the franchise system was first adopted in 1947, the distributors acquired their franchises for a nominal consideration. Over the years, as the original distributor sold the distributorship, the selling prices have reflected the extent to which each distributor has been successful in building up a valuable business enterprise in his territory. For example, the first sales of all original distributorships within the city brought the following prices: $6,600; $6,800; $8,500; $9,500; $10,000; $10,000; $10,000; $11,500; $12,000; $12,000; $15,000; $17,000; $17,000; and $17,500 (A. 1926-1929). Successive sales of distributorships have customarily showed a gain (A. 1926-1929). Thus, a distributorship acquired in 1953 for $8,500 was sold in 1967 for $16,000. A distributorship acquired in 1961 for $12,000 was sold in 1968 for $20,000. These are but illustrations of the many instances of the customarily increasing values of these franchises.

The Regional Director's decision refers generally to the power given by the franchise agreement to the distributors to sell, transfer or assign the distributorship (App. 39a, 44a). However, the opinion describes the sale as a "* * * three-party arrangement * * *" and concludes that petitioner controls the sale of the franchise and that the distributor must first obtain petitioner's approval before the sale of a franchise is consummated (App. 44a, 50a). As the written contract makes clear, petitioner's only right with respect to the sale or transfer of a franchise is the right of first refusal, a right which has only been exercised in one instance (A. 802-803). Over the years, more than 165 transfers have taken place. In some instances, the

franchise has passed by inheritance or assignment, in which case petitioner is not involved in any way (A. 926- 932, 947, 1102-1103, 1211-1215). Where the right of first refusal is not exercised, the sale by the distributor and his purchaser goes through and the only "* * * three-party arrangement * * *" takes place thereafter when petitioner secures a release from the former distributor and executes a new agreement with the purchaser (A. 1141-1143).

As to another critical aspect bearing on the status question, the Regional Director states generally that petitioner replaces lost or stolen papers without cost to the distributor and the street sales distributor may return extra papers. The record shows that each distributor decides how many daily papers he will receive and petitioner does not accept returns on unsold papers except from the five street sales distributors, a necessary aspect of that form of circulation (A. 15, 878-879, 922-923). No returns are accepted from the other distributors. Petitioner replaces lost, stolen or damaged papers only where the loss, theft or damage occurs before the distributor takes possession (A. 15, 684-685).

In treating of the matter of placing printed supplements and advertisements as inserts in the Sunday papers, the Regional Director's decision adverts to the fact that petitioner, upon learning that the inserts are not being made on the correct day, writes letters to the distributor which state "Please correct this condition promptly." (App. 47a). The record shows that, as to one distributor, between July 11, 1966 and January 15, 1968, fifty-eight such *requests,* each containing the quoted sentence, had been made without much effect (A. 2377-2431).

In dealing with the handling of complaints, the Regional Director's decision refers only to the situation with respect to calls from within city limits, stating that, upon receiving a complaint of non-delivery, a paper is delivered to the subscriber and the distributor is charged 25 cents (App. 48a). The decision fails to note that petitioner only handles such complaints if the city distributors so elect. The country distributors' names appear on their papers and the complaints by the subscribers are made directly to the appropriate distributor (A. 919-920, 924).

The Regional Director recognized that distributors decide whether to extend credit and bear the risk of non-payment by subscribers, own and maintain their own trucks, employ their own carrier boys, sometimes subcontract portions of their motor routes, pay all expenses of operating the distributorship, are not covered by petitioner for purposes of social security, workmens' compensation or income tax withholding, receive no vacations, holiday pay or other benefits from petitioner, obtain their own substitutes when necessary, attend no group meetings with petitioner, have other occupations,[3] are not required to keep any special type of records or have their books audited by petitioner (App. 37a, 39a, 40a, 46a, 48a).

In arriving at his conclusion that distributors were employees within the meaning of the National Labor Relations Act, the Regional Director placed principal emphasis on certain undertakings of petitioner; granting of allowances to distributors in connection with promotional campaigns; instructions to distributors with respect to the

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[3] The Regional Director stated that "a few of the distributors have held other jobs" (App. 48a). It is undisputed that more than 50% of the distributors have other occupations in addition to their distributorships (A. 165, 1923-1924).

handling of complaints; investigating start and stop orders, and canvassing, inserting printed insertions and participating in promotional activities and contests (App. 46a). Minimizing the distributor's control over and responsibility for the actual business of selling and delivering the newspaper and the clearly established proprietary interest which every distributor has in his franchise, the decision holds that petitioner "***maintains control over the manner and means of the result to be accomplished as evidenced by its memos, instructions and orders for handling complaints, canvassing, investigating and stop orders, etc.***" (App. 50a). The decision goes on to state that it is "***immaterial if the control is exercised by suggestion and request rather than by direct orders and is directed toward cooperative assistance in fulfillment of the agreement between the distributor and Employer. As the Employer has maintained control over the manner and means of the distributors' income and the result to be accomplished, I find they are not independent contractors but employees of the Employer.***" (App. 50a).

Petitioner requested that the Board review the Regional Director's decision (A. 27-81). The request was summarily denied on the ground that "***no substantial issue warranting review***" was presented (A. 81). Petitioner's motion to reconsider was also denied as was its motion to reopen the representation hearing (A. 82-83). On January 23, 1968, the Regional Director issued his Supplemental Decision and Certification of Representative (A. 84-90). Petitioner again sought review before the Board (A. 93-101). This was again summarily denied on the ground that it

raised "***no substantial issues warranting review.***" (A. 102).[4]

C. *The Unfair Labor Practice Proceeding.*

On December 29, 1967, a complaint was issued against petitioner on charges of viclation of various sections of the National Labor Relations Act. Petitioner submitted a substantial offer of proof on the question of the distributors' status (A. 103-166). However, the Trial Examiner declined to permit any showing to be made before him on that issue, accepting, instead, the determination as to the distributors' status made by the Regional Director in the representation proceeding (App. 31a). The Trial Examiner's decision and recommended order (A. 167-260) was adopted by the Board on March 3, 1970 (App. 19a). The Board specifically affirmed the refusal of the Trial Examiner to permit petitioner to litigate in the unfair labor practice proceeding the question of the distributors' status (App. 19a).

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[4] In November, 1967, forty-seven of the distributors had notified home delivery subscribers that they would be charged for evening and Sunday newspapers 10 cents per week more than a new proposed price set by petitioner. This action by distributors represented a significant fact in petitioner's motion to reopen the record in the representation proceeding. After petitioner's efforts before the Board failed, petitioner filed an injunction suit in the United States District Court for the Northern District of New York seeking an order that the representation proceeding be reopened and urging that the case came within one of the exceptions to the doctrine that representation proceedings are not cognizable in district courts and that certification proceedings can only be reviewed after a final order in an unfair labor practice proceeding. The complaint was dismissed and the dismissal was affirmed by the Court of Appeals for the Second Circuit. *Herald Co.* v. *Vincent*, 392 F.2d 354 (2nd Cir. 1968). The court of appeals recognized, however, that petitioner must, at some point, be given an opportunity to test the validity of the Board's rulings with respect to the proffered evidence on the status of the distributors. 392 F.2d at pp. 358-359.

D. *The Decision of the Court Below.*

The court below recognized that the principal question at issue was whether the distributors are employees within the meaning of Section 2 of the National Labor Relations Act. The court noted that general agency principles were to be applied in distinguishing between "employees" and any individuals having the status of "independent contractor" and referred, for the solution of this question, to the familiar "control" test: the distinction between the right to control the manner and means by which the result is to be accomplished, and control reserved only as to the results sought. Reference was made to this Court's decision in *N.L.R.B.* v. *United Ins. Co.*, 390 U.S. 254 (1968), which holds that the distinction between employees and independent contractors is to be resolved by an assessment of "***the total factual context***." 390 U.S. at 258.

The court then turned to a consideration of the opposing factual contentions of petitioner and the Board. First, it examined the rights and obligations imposed on the distributors by the franchise agreements, including the right to have an exclusive territory, to plan work schedules, to determine whether to extend credit with the consequent risk of non-payment in cases of bad credit; the obligation to provide motor vehicles and equipment at their own expense, the fact that petitioner is under no obligation to furnish vacations and other fringe benefits, and so forth (App. 7a). The Court noted that a distributor's income consists of the difference between the wholesale rate at which he buys the newspapers and the resale rate at which he sells the papers to carriers or subscribers (App. 8a). The Court also observed that distributors are permitted to hold jobs in addition to their distributorships and are free to distribute other newspapers along with those of petitioner (App. 8a).

The court recognized that the distributors have the right to sell or transfer their franchises and that this had been done in many instances, subject only to a right of first purchase by petitioner which had been seldom exercised (App. 8a). The court noted that more than 165 transfers had occurred since 1947 and that distributorships had been sold for as high as $17,000 (App. 8a). Two distributors had devised franchises to their widows (App. 9a).

The court then summarized the Board's contentions with respect to the geographical limitations of the territory to be serviced by the distributor, the requirement of a schedule for pick-up and delivery of newspapers, the submissions of lists containing the names and addresses of customers, the contention that petitioner gives instructions directly to carrier boys and has, in a few instances, instructed distributors to change them, the fact that four district supervisors work in the field to investigate delivery problems and participate in their resolution, etc. (App. 9a).

Next, the court turned to the Board's contentions with respect to the handling of customers' complaints (App. 9a), and the participation of distributors in promotional campaigns with payments of varying amounts to canvassers, carrier boys and distributors, depending upon the success of the canvass and the increase in circulation (App. 10a).

Finally, the court turned to what it considered a most critical point in the Board's favor—that petitioner has substantial control over the distributors' immediate income since it sets limits on the distributors' compensation

> "by establishing 'wholesale price ceilings' in the franchise contract. The ceilings have the effect of increasing the wholesale price of the papers to the

distributors when their purchases rise above their normal draw."[5]

The court attached significance, in connection with its view of the "wholesale price ceiling" power, to the fact that petitioner frequently awards bonuses, subsidies, and promotional monies (App. 10a). From these two facts, the court concluded that petitioner was able to control the immediate earning power of the distributors and exercised such control (App. 10a). Added to this was the court's view that, by threatening not to renew the franchises, the value of the franchises would be decreased (App. 10a). Here, however, the court recognized that even distributors who received non-renewal notices have been able to sell their franchises for substantial amounts (App. 10a).

Based on the above, the court concluded that there was substantial evidence to support the Board's conclusion that petitioner exercised supervision over the distributors'

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[5] The court below as well as the Board and its Regional Director failed to discuss the uncontested testimony of Company witnesses regarding the reason for including "ceilings" in some distributors' contracts. The Company had a more or less fixed wholesale rate charged each classification of distributors for their newspapers (A. 935, 959). In 1947 when the territories in the city were set up, certain territories were given a reduction in this set rate because they contained vacant or deteriorating areas or because a number of the customers in the particular territory were bad credit risks (A. 935-939, 957-959). Later, when some of these territories became more fully developed or the customers became more reliable, the Company inserted these ceilings into the distributors' contracts in order to bring the price of the newspapers in these territories up to the Company's standard wholesale rate (A. 935-939, Representation Hearing Transcript, page 1794). The ceilings were no more than an attempt by the Company to bring what theretofore had been reduced wholesale rates up to parity. Moreover, it should be noted that the "ceiling" provisions, negotiated at the outset of the contract terms, did not necessarily diminish the distributor's profit when his draw rose beyond a stated number, in view of lessened unit cost of delivery.

performances of their duties and that petitioner controlled the value of their distributorships as well as the immediate income of the distributors (App. 11a).

REASONS FOR GRANTING THE WRIT

I. *The Importance of the Question.*

The inescapable conclusion to be drawn from both the Regional Director's opinion in this case, and the opinion of the court below, is that all franchisees in this country—whether they distribute newspapers or engage in any of the hundreds of other businesses conducted under the franchise system—are not independent businessmen, but rather employees of their franchisors. This conclusion, which in the present case has made common law employees out of men who own valuable businesses that are regularly bought and sold for thousands of dollars, and whose income depends not upon wages or commissions but upon reselling at a profit goods whose title has passed to them, could have a pervasive effect on the entire franchise industry.[6]

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[6] Franchising is perhaps the fastest growing type of business relationship in the country today. Over 4,000 firms currently use the franchise system of distribution, accounting for more than 500,000 franchise owners. (Rosenberg, Robert M., *Profits from Franchising*, McGraw-Hill, New York (1969), p. 2.) In addition to those businesses long associated with the franchise system, such as automobile dealers, gasoline stations, and soft drink bottlers, today's franchises dispense such widely divergent products and services as food, income tax assistance, cosmetics, automobile parts and accessories, temporary office help, clothing, sanitation service, building materials, hotel accommodations, paints, even miniature golf courses. (Id. at p. 172, Appendix A). In the case of newspaper distribution, a substantial number of companies use the franchise system. (Brief of *Amicus Curiae*, American Newspaper Publishers Association, at page 2 (submitted to court below)). As a result of this meteoric rise in the number of U.S. franchises since World War II, franchising currently accounts for one-fourth of the total retail trade in this country, and approximately ten per cent of our Gross National Product, or 80 billion dollars a year. (Rosenberg, *op. cit.* at p. 2)

At the very least, should the NLRB voluntarily restrict the scope of its holding to newspapers, this would result in an industry with more than 1,700 members being arbitrarily deprived of the privilege to do business in a manner left open to hundreds of other industries. No sound reason could possibly be advanced for allowing automobile companies, oil companies, fast food chains, grocery store chains or any of the other businesses that distribute products and services through the franchise system, to continue operating unencumbered by the strictures of the National Labor Relations Act, while denying the same right to the newspaper industry.

A. *As a Matter of Law, the "Right of Control Test" May Not Be Used to Determine the Status of a Franchisee.*

The unfortunate result reached in the present case can be traced principally to the Regional Director's mechanical application of the "right of control" test — designed solely to distinguish between "employees" and "independent contractors" — to a group of franchisees who fit into neither of these categories.[7] *All* franchisees are controlled by their franchisors, sometimes in practically every detail of their operations. They nevertheless possess the two most significant benchmarks of an entrepreneur—a proprietary interest in their business which can be converted

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[7] The Regional Director emphasized the importance of deciding this case solely upon a literal application of the above test by stating in a footnote:

> "It is not the precise terminology of the franchise agreement that determines the status of independent contractors. *The status is determined by the right-of-control test stated hereinabove.*" (App. 49a, n. 15). (Emphasis added.)

into cash by sale to a new owner, and a type of income generation which involves taking title to a product by purchasing it from another, then reselling to the public at a profit. As such, the franchisee does not have a "job" at all. For a job cannot be bought and sold. Rather, the franchisee has a business of his own, albeit a hybrid in terms of the traditional employee—independent contractor dichotomy.[8]

The National Labor Relations Act does not require—nor does it even suggest — that all individuals who work be classified as either employees or independent contractors. The Act merely provides that "employees" alone fall within its coverage. Because, however, individuals having the status of true independent contractors often bear a striking resemblance to employees — *i.e.*, they are hired by someone to do a certain job for which they are paid, often by a set, predetermined amount—Congress deemed it necessary to make clear in the definition of employee that in-

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[8] See Thompson, Donald N., *Franchise Operations and Antitrust*, Heath, Lexington, Mass. (1971)), p. 6:

> "It is the legal profession which has been perhaps most interested in defining and classifying the franchising form. In general, their efforts have led to the conclusion that the franchise system cannot be classified under the usual forms of business organization. While there is agreement as to the legal classification of the franchise relationship, that agreement is a negative one; the relationship is not one of either employment or of agency. Also, to the extent that a franchisor restrains his franchisees as to the methods and conditions under which the franchise may be operated, the relationship does not fit within the traditional legal definition of an independent contractor relationship. Although it has definite characteristics of each of the legal forms of employment, agency, and independent contractor, and might well have been considered as a hybrid of all of these, it fits so badly into any of these traditional classifications that it has generally been considered as being *sui generis*."

dependent contractors are not covered by the statute. Hence, it specifically excluded them, along with several other categories of workers, such as supervisors and agricultural laborers. Nowhere in the Act, however, is it stated that all individuals who fall outside these specified exclusions are automatically deemed employees. To the contrary, even after the Taft-Hartley amendments, the Act continues to be silent as to the precise definition of employee.

As a practical matter, since 1947, the NLRB has been able to resolve most questions of coverage by resort to the test used in the present case. For it has been clear in most cases that the subject individuals, if they were not independent contractors, *were* in fact employees. But it must not be forgotten that the test is, by the Board's own admission, useful only in determining whether a given individual is, or is not, an independent contractor.[9] The mistake made in the present case was in erroneously concluding that the Herald Company's distributors had to be employees, simply because there was control over some aspects of their daily activities. As a matter of law, however, no individual who owns his own business which can be alienated at will, and who depends for his livelihood upon buying a product and reselling it at a profit, can be considered an "employee" of the company whose product he buys.

The very fact that the distributors purchase papers from petitioner, taking title to them and assuming the risk of their loss, is in itself sufficient to negate an employment

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[9] As the Board stated in *Pure Seal Dairy Co.*, 135 NLRB 76, 79 (1962):

> "It is well established that in determining the status of persons *alleged to be independent contractors*, the Act requires the application of the 'right to control' test." (Emphasis added.)

relationship. Indeed, there is precedent dating back at least 50 years, some from this very Court, indicating that such an arrangement between manufacturer and distributor does not even rise to the level of common law agency, let alone employment of the type generally regulated by the National Labor Relations Act. The present franchise agreement is nothing more than a sales contract, wherein the seller (petitioner) retains a degree of participation in the manner and means whereby the buyer (distributor) resells the product.

In a 1921 case, whose facts are quite similar to those in the present situation, this Court held that the relationship between the plaintiff manufacturer and defendant distributor was one of sale, not agency. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922). Plaintiff was a manufacturer of dress patterns, defendant a department store in Boston. The parties agreed that defendant would have the exclusive distributorship in the city of Boston for plaintiff's patterns. The contract required that defendant purchase patterns from the plaintiff, together with certain advertising matter and other publications. The defendant agreed to purchase a substantial number of patterns, and to keep on hand at all times a predetermined inventory. The contract provided that there could be no assignment or transfer of the distributorship without the consent of the manufacturer, and that during the term of the distributorship the defendant department store was not to sell any patterns other than those manufactured by plaintiff. Moreover, plaintiff fixed the retail price at which the patterns were to be sold.

When it appeared that defendant had breached the contract by selling patterns of other manufacturers, litigation ensued. One defense raised by the defendant was that the contract violated the Clayton Act insofar as it fixed retail

prices and restricted sales by defendant of competitive patterns. Plaintiff maintained that the Clayton Act was not violated, since the contract merely made defendant plaintiff's agent, whose conduct defendant could freely control. The Court disagreed. It is clear from a reading of the opinion that the Court considered the most significant indicia of sale to be the fact that defendant actually purchased the patterns from plaintiff rather than receiving them on consignment or merely selling them for a commission. The Court stated:

> "Full title and dominion passed to the buyer. While this contract is denominated one of agency, it is perfectly apparent that it is one of sale." 258 U.S. at 354.

In *Matthews Conveyer Co.* v. *Palmer-Bee Co.*, 135 F. 2d 73 (6th Cir. 1943), an arrangement whereby defendant purchased industrial machinery from plaintiff in order to resell it within a certain geographic area was likewise denominated a sales contract, not an agreement of agency. Moreover, this conclusion was reached by the court even though plaintiff manufacturer retained considerable control over the manner and means whereby defendant sold, distributed and installed the subject property. In reaching its decision, the court focused on many of the same considerations that are present in the instant case. For example, it pointed out that the defendant distributor took title to the property after having purchased it outright from the plaintiff, that the defendant dealt directly with its own customers, billed them in its own name and assumed all credit risks for payment.

The court completely rejected an argument advanced by the manufacturer that the retained controls necessarily showed a relationship of agency rather than sale. On this point the following quotation is especially relevant to the present case:

"While the agreement that defendant was to devote its best efforts to the sale of plaintiff's products may seem like an obligation of agency, there is no reason why a manufacturer may not require of all persons to whom it sells its goods, to do all that they lawfully can to make sales, to promote its interests. This does not necessarily show a relationship of agency; nor is the fact that the parties made use of the word 'commissions' controlling. For this was merely a way of adding a profit to the buyer, who sold to the public, and was an added incentive for the defendant to sell more of plaintiff's products. [Citations omitted] Whatever control may be said to have been exercised by plaintiff over defendant, is not decisive on the issue of the agency. One may submit to a degree of control by another without being his agent; and one may control the conduct of another without being a principal, and without giving to the other authority to bind him. In this case, it can be said that plaintiff desired to sell its products in such a manner that its interests might be promoted, and required as part of the price in the making of the contract, that defendant, to whom it sold, should submit to certain restrictions. Defendant was anxious to purchase plaintiff's product, and in order to purchase was willing to submit to the required conditions and restrictions." 135 F. 2d at 81.[10]

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[10] In contrast to this decision, when the relationship does not involve the taking of title to goods by the putative independent seller, the courts are more likely to consider that the relationship between the parties is one of agency. Thus in *Loren Specialty Mfg. Co.* v. *Clark Mfg. Co.*, 241 F. Supp. 493 (D.C.N.D. Ill. 1965), *aff'd*, 360 F. 2d 913 (7th Cir.), *cert. den.*, 385 U.S. 957 (1966) plaintiff's complaint, charging a violation of the Robinson-Patman Act, was dismissed upon a finding that two distributors (who were alleged to be purchasing products from defendant manufacturer at a lower price than was charged to plaintiff) were not really independent businessmen in competition with plaintiff, but rather were merely agents of the defendant. In reaching this decision, the court listed five facts which, in its opinion, demonstrated an agency rather than a sale. First on the list was the fact that title to the goods never formally passed to the alleged purchasers.

In addition to its failure to hold that passage of title to the newspapers negates an employment relationship, the Board in the present case also failed to appreciate the significance of the proprietary interest that each distributor has in his franchise. This proprietary interest gives the distributor not only the right to sell his business but also the right to bequeath it to his heirs. Like the passage of title, such an interest is so significant an element of entrepreneurial status that it completely negates a finding of an employer-employee relationship.

In *Frito-Lay, Inc.* v. *NLRB,* 385 F. 2d 180 (7th Cir. 1967), a case which is treated more fully, *infra.* pp. 36-37, the Court of Appeals discussed at length the Regional Director's failure to find that the subject distributors had a proprietary interest in their routes. After pointing out that 19 of the 24 distributors in that case owned their own routes as well as their own trucks "with all the prerogatives that go with ownership", the Regional Director nevertheless reached the conclusion that the distributors did not have a proprietary interest. To this holding the Court of Appeals responded:

> "In our view, this conclusion is wholly without support from either an evidentiary or legal standpoint. The Board does not contend to the contrary but instead feebly suggests in a footnote that a finding was based upon the Regional Director's recognition of the 'underlying legal and economic realities.' " 385 F.2d at 184.

It is obvious from the *Frito-Lay* opinion that the Court of Appeals regarded proprietary interest as the most significant indicia of entrepreneurial status. The Board likewise must have regarded this interest as crucial, for the Regional Director in *Frito-Lay,* contrary to the Regional Director in the present case, affirmatively stated that the Frito-Lay distributors did *not* have a proprietary interest in their

routes. Although the Court of Appeals disagreed with this finding, the Board was at least acting in a manner consistent with its prior decisions, for it did not find employee status until it had first *rejected* the notion of proprietary interest. To this extent, the present case is especially significant, since it marks the first time that the Board has apparently conceded the existence of a proprietary interest, but nevertheless has given this fact practically no weight whatsoever.[11]

The Board's willingness to distort both the economic and legal realities of the relationship between petitioner and its distributors can be traced directly to the direction and control test. For when this test is applied to a franchisee, it will almost invariably result in a determination that the franchisee is an employee. This is so for the simple reason that the direction and control test focuses almost completely upon one aspect of the franchise relationship which is practically always present, *i.e.*, control of the franchisee's activities by the franchisor. Unfortunately, the test ignores other factors which conclusively demonstrate that persons such as petitioner's distributors are true independent businessmen.

B. *The Decision in This Case is Inimical to Basic Concepts of Franchising.*

Most authorities in the field regard as the primary attraction of franchising the possibility that a man can own and

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[11] Compare *Pulitzer Publishing Co.*, 146 N.L.R.B. 802 (1964); *Hearst Publishing Co.*, 102 N.L.R.B. 103 (1953); and *Kansas City Star Co.*, 76 N.L.R.B. 884 (1948) (all cases in which newspaper distributors having proprietary interests in their routes were held not to be employees) with *San Antonio Light Division*, 174 N.L.R.B. No. 94 Feb. 17, 1969) and *El Mundo, Inc.*, 167 N.L.R.B. 760 (1967) (cases in which newspaper distributors *not* having proprietary interests in their routes were held to be employees).

operate his own business with a minimum amount of capital and a maximum assurance of success. This relative ease of entry into the business world is made available to the aspiring entrepreneur only in exchange for his agreement to relinquish some of the traditional independent businessman's autonomy. Indeed, the system could not work in any other way. As David B. Slater, President of Mister Donut of America, Inc., wrote in the Summer, 1964 issue of the *Boston University Business Review*:[12]

> "Whatever else it is, the franchise is not a license to mint money at someone else's expense—that someone else being the franchisor who presumably takes the bigger risk. The franchise merely gives the individual one major right, that of owning his own business and having pride of independence which accompanies being his own boss to a greater than a lesser extent. In exchange, he must give up certain things—such as the inalienable right to mismanage his own business." Id. at p. 21

Ironically, the same centralized supervision and control that is so necessary for the survival of both parent company and individual franchisee has been used by the Board in the present case as the basis for holding that petitioner's franchisees are not independent businessmen at all.

Essential to the success of any franchise, whether it be a franchise to sell newspapers, or one to sell hamburgers, cars, or gasoline, is a preservation of the franchisor's reputation and goodwill. Often through years of painstaking effort the franchisor has succeeded in convincing the public that his particular product or service is outstanding. And, indeed, it is often this very reputation that is most appealing to the prospective franchisee; for it allows him to eliminate much of the risk inherent in opening a completely

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[12] Slater, David B., "Some Socio-Economic Footnotes on Franchising," *Boston University Business Review*, Summer, 1964.

new, unknown business. In the case of the Herald Company, at least part of its goodwill and reputation for excellence stems from years of reliable distribution to subscribers. It is only natural, therefore, that petitioner would endeavor to control, at least to a small extent, the manner in which its franchised dealers perform this distribution service. Furthermore, since a newspaper's advertising revenues depend primarily on the size of its circulation, it will always be in the best interest of a paper to assist distributors in increasing the number of subscribers by sales promotions or other related activities.

Controls of this sort over the operations of franchisees, whatever may be the business involved, are inextricably woven into the very fabric of the franchise system. For in many ways a franchise is like a partnership, with one partner (the franchisor) supplying the product or formula, plus goodwill, trademarks, methodology, etc., and the other partner (the franchisee) supplying capital and labor. Notwithstanding the necessary controls that a franchisor will always exercise over his franchisees, it has long been recognized by all involved in the industry that the franchisee who invests his capital, hires his own help, purchases and maintains his own equipment, measures his success or failure in terms of profit, and has the power to sell or bequeath his franchise to others, is *not* an employee of the parent company. In fact, the very desire to escape the employment status is what propels so many thousands of persons each year to purchase franchises.

In his book, "Profits From Franchising," Robert M. Rosenberg, President of the fast food franchise chain, Dunkin' Donuts of America, Inc., devotes an entire chapter to the need for centralized control by the franchisor.[13] Moreover, as the Dunkin' Donuts franchise agreement il-

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[13] Rosenberg, *op. cit.*, p. 114, Chapter 10.

lustrates, this franchisor does, in fact, control practically every aspect of the franchisee's operation.[14] By comparison, petitioner's control over its distributors is *de minimis*. For example, the Dunkin' Donuts Company must approve all materials, merchandise and supplies that are used in the individual shops; the shop owner must submit to the parent company weekly gross profit figures, monthly operating statements and bi-yearly profit and loss statements; the company conducts periodic inspections of shops to check upon production methods, merchandising techniques, even store equipment — and it possesses the absolute right to remove from the stores any objectionable material or equipment; the company determines both the type and frequency of repairs to stores; it determines the days and hours that the store may operate; it examines all books and records of the store owner, approves all new construction, trains any employees whose duties require specialized skills, and approves local advertising; the company has the absolute right to terminate the franchise should the licensee be in default of any provisions of the agreement for more than seven days; at the end of the franchise term the company may refuse to renew the agreement on ninety days' notice; the agreement contains an elaborate covenant not to compete; and finally, in the event a franchisee wishes to sell or otherwise assign his franchise, he must give the company a right of first purchase, plus the power to reject any potential purchaser.

While the foregoing example may represent an extreme degree of franchisor control, it is no doubt safe to assume that a good percentage of the Dunkin' Donuts clauses are common throughout the franchising industry. As a result there are probably few, if any, franchise holders operating today who would not be considered employees if the test

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[14] *Ibid.*, Appendix B.

used by the Board in the present case were applied to them. Yet it should be obvious that Congress never intended an employer-employee relationship to exist between such groups as General Motors and its Chevrolet dealers, Atlantic-Richfield Co. and its gas station proprietors, or Howard Johnson and its restaurant owners.[15]

C. *Neither the NLRB nor Labor Unions are Equipped to Regulate the Franchising Industry.*

The potential impact of the decision in this case upon traditional concepts of labor-management relations is tre-

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[15] In recent years, numerous bills have been introduced into Congress all designed, in some way, to protect franchisees. Not only from the definitional sections of these bills, but also from their subject matter, it can be clearly seen that Congress regards the franchisee as a typical small businessman, sometimes in need of legislated protection from the larger company with whom he does business, but nonetheless a separate economic entity from his franchisor. Were the franchisee merely employed by the parent company, none of these pieces of proposed legislation would even make sense, let alone be of potential benefit to the franchise holder. See, *e.g.*, Stuckey Bill, H.R. 19022, 91st Cong., 2d Sess. (1970) (proposed requirement that franchisors make available prospectuses and other financial data to prospective franchise purchasers); Williams Bill [The Franchise Fair Practice Act], S.2399, 92nd Cong., 1st Sess. (1971) (providing that FTC may issue rules and regulations requiring disclosure of financial and other data to prospective franchise purchasers); Eastland Bill [Franchise Distribution Act of 1967], S.2507, 90th Cong., 1st Sess. (1967) (elimination of unfair competitive practices by franchisors, such as competing with own franchisees in sale of goods, or selling product to others at lesser price than product is sold to franchisees); Kluczynski Bill, H.R. 2818, 90th Cong., 1st Sess. (1967) (creating a federal cause of action for breach of franchise agreements by franchisors); Hart Bill [Fairness in Franchising Act of 1969] S. 1967, 91st Cong., 1st Sess. (1969) (defining "franchise" as a relationship wherein the "franchisee" is "an independent business": also provides federal cause of action for violation of unfair competition provisions of Act, which are stated to be same as those in Federal Trade Commission Act); Hart Bill [Fairness in Franchising Act of 1971], S. 2472, 92nd Cong., 1st Sess. (1971) (revised form of 1969 bill).

mendous. It will force both labor unions and the NLRB to abandon many of their long-standing methods of operation in order to organize and regulate a group of businessmen whose problems and ambitions are, in the main, completely foreign to the purposes of the National Labor Relations Act.[16] Unions, for example, exist to improve job security, wages, fringe benefits and working conditions, But, in the case of the legitimate franchise, there is no job to keep secure. There is, instead, a tangible capital asset — a business — for which the franchisee paid a large sum of money, and which in the case of petitioner's distributors

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[16] Holding a legitimate franchisee to be an employee of his franchisor, rather than an independent businessman, is not only inconsistent with national labor policy, it also contradicts the treatment afforded franchising by both courts and Congress under the anti-trust laws. It has long been recognized that some of the conditions sought to be imposed upon franchisees by their franchisors can violate the Sherman Act. See, *e.g., U. S.* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967); *Susser* v. *Carvel Corp.,* 332 F. 2d 505 (2d Cir.), *cert. granted,* 379 U.S. 885 (1964), *petition for cert. dismissed as improvidently granted,* 381 U.S. 125 (1965). In fact, legislation has been introduced to exempt certain conduct of franchisors from the anti-trust laws. See H.R. 4069, 90th Congress, 1st Sess. (1967), which would amend the Sherman Act to permit territorial exclusivity arrangements between franchisors and franchisees under certain circumstances.

Obviously, however, no restriction imposed upon a franchisee by his franchisor could ever be in violation of the anti-trust laws if the franchisor were merely directing and controlling his "employee." Thus, judicial and Congressional concern over the anti-trust implications of franchising can only mean that the franchise model consists of two separate, independent business entities.

cannot be taken away without repayment of this money.[17] Nor are there any wages or commissions over which the parties may bargain. Petitioner's distributors depend on profit margin for their income. They purchase a product, take title to it, bear the risk of its loss or non-salability, and resell it to others. Finally, all individual fringe benefits and working conditions are determined by the distributor himself. He can set his own hours of work, take off whatever days he chooses, hire other persons to do some or perhaps all of his normal duties; and, since he owns his own trucks, and owns or rents his own offices or warehouse, the distributor is the sole judge of the conditions under which both he and his employees work. To this extent, he is actually far more independent than the average franchisee.

In addition to the unions, the NLRB is also ill-equipped to regulate the conduct of franchisors, as can be seen by the very remedy presecribed in the present case. The Herald Company is told to "reinstate or renew" the franchise

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[17] William Irving, President of the union's "Herald Journal Division," recognized in this very case the internally inconsistent position that must be taken by any labor organization seeking to represent independent businessmen. As he stated in a letter to petitioner's distributors, dated October 12, 1967:

> "To become union is probably one of the best and most important things that could every [sic] happen to any of us. This *will not* mean that we will be 8 to 5 timeclock employees. This *will* mean that we will come under the Federal Labor Laws and can bargain collectively, represented by the union and our legal advisors. Thus, the value of each and every franchise will be increased a great deal. We *will* retain the ability to buy and sell the franchises as we have in the past. The only changes which we will negotiate will be improvements in our conditions. Company representatives may try to threaten you by claiming otherwise, but don't be deceived." (A. 166) (Emphasis in original.)

agreements of twelve individuals (A. 259). But what about the twelve men who now hold these franchises? Because the Board is conditioned to dealing only with jobs, where men can be laid off, it has completely overlooked the significant fact that each of these twelve incumbent franchisees has paid thousands of dollars for his business. A distributor cannot be "laid off." Nor can he be forced to relinquish his business during the term of the franchise. In fact, even as to the twelve men themselves, an irreconcilable conflict arises. For two of the twelve held the same franchise. Which one is now entitled to it? And whose business does the Board expect petitioner to destroy in order to make room for the other one? It is not petitioner's intention that this Court answer these specific questions. Rather, petitioner raises the questions simply to illustrate the fact that Congress could not possibly have intended that the NLRB assume jurisdiction over legitimate franchise operations.[18]

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[18] In addition to the obvious fact that a franchise, unlike a job, is itself an identifiable economic entity in which an individual has a substantial proprietary interest, there is also nothing to prevent the franchise holder from being a corporation. In fact, the Dunkin' Donuts agreement, cited *supra*, specifically provides that the franchisee may incorporate. It should be clear that a corporation cannot be the employee of another corporation; yet this absurd result could easily obtain if the direction and control test were applied to a typical corporate franchisee.

The tax consequences of the present case are likewise perplexing. As the record indicates, petitioner currently withholds neither federal income tax nor social security tax for its distributors. However, so long as the distributors are common law employees, petitioner will now be required to withhold these taxes. But on what basis can it withhold? Petitioner pays neither wages nor commissions to its distributors, except in the case of promotion monies and bonuses. Rather, the bulk of all income received by distributors comes in the form of profits, money that never passes through petitioner's hands.

The need for review by this Court is clear. Neither the Board nor the court below has ever questioned the fact that petitioner's distributors are indeed legitimate franchisees. Nor has any attempt been made to distinguish these individuals from any of the other half million franchise holders now owning businesses in this country.[19] Yet they are held to be employees. The implication is obvious. Unless the Board abandons its common law direction and control test in franchise cases, an employer-employee relationship could be forced upon thousands of companies and hundreds of thousands of individuals who, until now, have voluntarily chosen a different method of doing business.

II. *The Conflict of Circuits.*

If the question of status presented by this case must be resolved in traditional terms — that is by balancing facts and reaching a conclusion under the "right of control" test — the resolution must involve a realistic appraisal of the total situation presented. This is the primary duty of the Board. And the reviewing court, while it may not substitute its judgment for that of the Board where the evidence admits of two fairly conflicting conclusions, must nevertheless examine the whole record, taking into account whatever fairly detracts from the evidence relied on by the Board. This, of course, is the well established principle laid down by this Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951). "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds." 340 U.S. at p. 490.

The court below, we submit, did not review the record in this case in the light of this principle. The uncontraverted

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[19] A recent report from the Commerce Department indicates that sales of goods and services through 407,000 franchise establishments are expected to total more than $132 million in 1971. U.S. Dept. of Commerce News, G 71-133 (August 13, 1971).

facts—the negotiated contract establishing the rights and duties of the parties for a long term, the proprietary interest of the distributor, the effeciency and success of the distributor's operation as the source of his income, the distributor's control over the physical delivery and sale of papers purchased from petitioner at wholesale, the risk of loss for bad credit or lost or damaged papers, the distributor's responsibility for motor vehicles and other equipment, the distributor's freedom of any obligation of personal performance — these and many other facts are entirely inconsistent with the employment relationship. So other courts of appeals have found in decisions which are in square conflict with the decision of the court below in this case. *N.L.R.B.* v. *A. S. Abell Co.*, 327 F. 2d 1 (4th Cir. 1964); *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F. 2d 180 (7th Cir. 1967); *Carnation Co.* v. *N.L.R.B.*, 429 F. 2d 1130 (9th Cir. 1970).[20] These decisions were cited to the court below but its opinion does not discuss them.

A. *N.L.R.B.* v. *Abell Co.*

This case involved a physical situation identical in many respects to the situation in the instant case. The Board found that the various classes of newspaper distributors for two Baltimore publishers were employees and that the publishers were guilty of unfair labor practices. The Court

[20] On July 12, 1971, the Court of Appeals for the Third Circuit sustained the Board's holding that deliverymen for a Wilmington newspaper were employees. *News-Journal Co.* v. *N.L.R.B.*, ——F.2d —— (3rd Cir. July 12, 1971). The opinion indicates that the newspaper closely controlled all aspects of the delivery operation. Further, the delivermen did not buy the papers at wholesale and sell them at retail, nor did they have a proprietary interest in their routes. The court found their status not analogous to that of franchisees.

of Appeals for the Fourth Circuit, after reviewing the whole record, declined to grant enforcement.

The facts in *Abell* were these. A written contract provided that, in return for an exclusive territorial privilege, the distributor would pay monthly at a specified rate for papers and would endeavor to promote the sale of the newspaper within his territory. The distributor undertook to sell no other Baltimore newspaper and was required to maintain a current list of subscribers which was to be the property of the publisher. One form of contract was terminable upon distributor's failure to meet his financial obligations, or by either party upon ten days' notice. Another form of contract permitted termination by the publisher without notice.

After noting these aspects of the formal contract relationship, the Court of Appeals for the Fourth Circuit reviewed the actual business details, pointing out that the essential business decisions concerning the operation of the distributors were within the discretion of the distributor who would either reap the profits or bear the losses flowing from his judgments. Thus, the distributors determined the number of papers he received and ran the risk of overordering since no returns were accepted, of lost or damaged papers and bad credit risks. He had to make decisions on customer solicitation, to choose whether to operate the route personally or through helpers or substitutes. If he employed others, he had to decide the manner and amount of their compensation. He had to attain economy in equipment, maintainance and the use of helpers. All of these things, the court noted, affected the amount of the distributor's income, the profit represented by the difference between the price of the paper plus operating expenses and the sum collected from customers. The

situation afforded the distributor "* * * the opportunity to increase his profits through industry, diligence, and sound business judgment, while presenting the risk that his profits will be lessened by inefficiency and carelessness. * * *" 327 F. 2d at p. 7.

The Board's decision in *Abell* was essentially based on the view that "* * * the system of cost-and-price determination effectively limits the carrier's control over his earning power." 327 F. 2d at p. 3. On this basis, plus the terminability of the relationship, the Board found the "entrepreneurial aspect" of the distributor's operation outweighed by these so-called "control" factors. The Court of Appeals found no basis for this conclusion, emphasizing again the control of the distributor over the business of delivering newspapers and collecting for them, the risk involved, the degree of success in the form of profit being determined by judgment, diligence, and economy of operation.

In most major respects, the situation in *Abell* and that presented in the instant case are identical. Moreover, there is an additional strong factor here that is not present in *Abell,* namely, the fact that the distributors in this case develop a very substantial proprietary interest in their franchises and territories, an interest which can be and frequently is sold for ever increasing amounts.[21] In short, a realistic appraisal of the whole record in this case should have compelled the conclusion that the factual pattern — the pattern which fixes the relationship between petitioner and distributor — precluded a holding that the distributors were employees.

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[21] As shown above, prior to its decision in this case, the Board has considered that the presence of such a proprietary interest nullified the possibility of an employer-employee relationship. *Supra,* p. 24, fn. 11.

B. *Frito-Lay, Inc.* v. *N.L.R.B.*

This case involved a ruling by the Board that single truck distributors of the company's snack food products were employees within the meaning of Section 2(3). Again, enforcement was denied.

In *Frito-Lay,* distributors financed, insured and maintained their own vehicles; had their own bank accounts and filed individual tax returns; determined the quantity of products to be ordered and sold and determined the order of route stops, the amount of time to be spent in the work, were free to hire helpers at their own discretion. The company did not pay workmen's compensation, unemployment insurance, social security and did not withhold income taxes.

The truck distributors owned their own routes and could sell the route subject to the company's approval of the purchaser. The Court of Appeals for the Seventh Circuit rejected the Board's finding that the distributors did not have a proprietary interest as a matter of "underlying legal and economic realities." 385 F. 2d at p. 184.

The court discussed some of the factors which had been relied upon by the Board, such as the conducting of sales meetings for the purpose of promoting sales, announcing specials, furnishing company representatives to assist with sales, making available advertising materials, and so forth. All of these, the court observed, showed concern with the end result, that is, the sale by the distributors of the products purchased from the company, emphasizing that the well being of the company as well as the profit of the distributor derived from the maintenance and increase of sales. 385 F. 2d at p. 184-185.

Again, as with *Abell,* the *Frito-Lay* case is in many major respects identical with the instant case. The income of the distributor depends entirely on his ability to handle his route, the judgments he makes as to purchases from the company, the efficiency with which he operates his equipment, and maintains and increases his sales. The distributors in *Frito-Lay* could sell their routes but, unlike the instant case, subject to approval by the company of the purchaser.

Here, again, the fact pattern, the total factual context in which the relationship was to be judged, compelled the conclusion, as it should in the instant case, that the distributors were not employees.

C. *Carnation Co.* v. *N.L.R.B.*

In *Carnation,* the Board held that wholesale and retail route drivers, selling and delivering dairy products, were employees and that the company was guilty of various unfair labor practices. The Court of Appeals for the Ninth Circuit set the Board's decision aside.

The basic physical pattern here is the same as that in the instant case, *Abell* and *Frito-Lay.* The distributors set their own hours, pay their own license fees and taxes, obtain their own insurance, hire their own helpers and substitutes, realize their profit on the basis of the difference between operating cost, including costs of the company's products, and the price charged to customers.

The company's control over its distributor in *Carnation* was far closer than in *Abell, Frito-Lay* or the instant case. The distributors purchased their trucks from the company, securing the purchase by an assignment of accounts receivable and the establishment of a joint bank account from

which withdrawals could be made only on the basis of joint signatures. The company reserved the right to furnish advertising material which the distributor had to install and maintain at his own expense, meeting Carnation's standards. The distributor was required to paint his vehicle in a certain manner and maintain the paint to the satisfaction of the company.

The agreement was terminable on thirty days' notice by either party and on one day's notice by the company in the event of a breach by the distributor. Where the company elected to terminate by reason of a breach, the company took title to any truck on which a balance was owing without accounting for the distributor's equity. Upon termination, the distributor was required to resell to the company all his accounts receivable. He was forbidden to sell or encumber his accounts receivable and was not free to assign his contract without the company's prior written consent.

The court characterized all of these aspects of the relationship as economic controls, not relevant to decision on the question of status, rejecting the Board's argument that economic controls were sufficient to justify a holding that the drivers were employees. 429 F. 2d at p. 1134. To the contrary, the court observed that these factual aspects of control were characteristic of many "* * * 'franchise' arrangements oriented toward brand-name protection and market penetration * * *." 429 F. 2d at p. 1134.

The factual pattern in the instant case is far clearer, we submit, than that in *Carnation*. Here, the distributors enjoy almost complete freedom, subject only to participation in promotional campaigns and the like, activities designed to be mutually beneficial to both company and distributor. If the "control" test is to be decisive, the total

factual context weighs heavily against a finding of employer-employee relationship.

Carnation also exposes the essential fallacy in the decision of the Board and the court below in the instant case. As the Court knows, Congress, in 1947, amended Section 2(3) of the Act so as to reject the Board's view that it could determine coverage broadly on the basis of its own view of "economic realities." H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947). Here, while invoking the control test, the decision actually turned on just such factors. The Regional Director placed his decision, in major part, on "* * * control over the manner and means of 'the distributors' income * * *." (App. 50a). The Board's brief in the court below (p. 44) stated that the distributors were employees "as a matter of economic reality", citing the Court's decision in *U. S.* v. *Silk,* 331 U.S. 704 (1947) which rested on the reasoning in *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111 (1944), the reasoning legislatively overruled by Congress in 1947. Finally, the decision of the court below was based primarily on its understanding of the financial arrangements between petitioner and the distributors (App. 11a).

A franchise relationship can never be converted into an employment contract by reason of controls exercised by the franchisor. See *supra,* pp. 17-24. But even if the "control" test is to be determinative, economic controls, such as those emphasized by the Board and the court below, should not serve to change a small businessman into an employee.

CONCLUSION

For the reasons set forth above, this petition should be granted.

Respectfully submitted,

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Dated:

JUDGMENT

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE HERALD COMPANY, et al.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200, AFL-CIO, and SYRACUSE MAILERS UNION, NO. 73,

Intervenors.

No 34620 & 34791

—

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200, AFL-CIO, and SYRACUSE MAILERS UNION, NO. 73,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

THE HERALD COMPANY, et al.,

Intervenors.

No. 34935

Judgment

Before: LUMBARD, ANDERSON and FEINBERG, Circuit Judges.

The above consolidated causes came on to be heard upon petitions to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated March 3, 1970, against Herald Company, its officers, agents, successors and assigns. The Court heard argument of respective counsel on March 2, 1971, and has considered the briefs and transcript of record filed in the causes. On June 11, 1971, the Court being fully advised in the premises, handed down its decision denying the petitions for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, IT IS ORDERED AND ADJUDGED by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Herald Company, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that the costs of the Board's brief and the cost of the joint appendix to the briefs shall be taxed against the Petitioners in the following proportions:

Petitioner, Herald Company 80%
Petitioner, Building Service
Employees International Union, Local 200,
AFL-CIO, and Syracuse Mailers
Union, No. 73 .....20%

s/ J. EDWARD LUMBARD
Judge, United States Court of Appeals for the Second Circuit

s/ WILFRED FEINBERG
Judge, United States Court of Appeals for the Second Circuit

Filed: July 2, 1971

DECISION

(SAME TITLE)

Nos. 726, 727, 728—September Term, 1970.
(Argued March 2, 1971 Decided June 11, 1971.)

Before:

LUMBARD, ANDERSON and FEINBERG,
Circuit Judges.

Consolidated petitions of The Herald Company and union locals to review and set aside or modify an order of the National Labor Relations Board, 181 N.L.R.B. No. 62, holding that The Herald Company violated sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act, and ordering The Herald to engage in certain remedial conduct to make amends for its unfair labor practices. The Board cross-petitions for enforcement of its orders.

Petitions to review denied and Board's order enforced.

TRACY H. FERGUSON, Syracuse, New York (Bond, Schoeneck & King, Raymond W. Murray, Jr., Francis D. Price, Sabin, Bermant & Blau, New York, New York, on the brief), *for petitioner-intervenor, The Herald Company, et al.*

DONALD W. SAVELSON, Attorney, N.L.R.B. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Leonard M. Wagman, Attorney, on the brief), *for respondent, N.L.R.B.*

BERNARD T. KING, Syracuse, New York (Blitman and King, Thomas J. Maroney, on the brief), *for petitioner-intervenor, Local 200.*

Decision

ARTHUR B. HANSON, RALPH N. ALBRIGHT, JR., Hanson, O'Brien, Birney and Stickle, Washington, D. C., on the brief, *attorneys for amicus curiae The American Newspaper Publishers Association.*

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LUMBARD, *Circuit Judge:*

The Herald Company, which publishes and distributes three newspapers in Syracuse, New York, petitions this court to review an order of the National Labor Relations Board, issued on March 3, 1970, pursuant to section 10c of the Act, and the Board cross applies for enforcement. Shortly after the Board filed its petition for enforcement, The Building Service Employees, International Union, Local 200, AFL-CIO and the Syracuse Mailers Union No. 73 intervened. These unions joined together in filing a petition to review the Board's order in a separate action on the theory that the Board failed to grant them certain relief, and the Company intervened in that case. These two cases have been consolidated and were heard together. We deny the petition to review and grant enforcement of the Board's order.

Following a lengthy hearing the Board's Regional Director for its Third Region on July 19, 1967 issued a decision and directed an election for all of the distributors of the Herald Company's newspapers. He defined the appropriate bargaining unit in which to conduct the election as follows:

> All city, motor route, street sales, country and suburban distributors employed by the Employer at Syracuse and the central New York area, but excluding all other employees, office clerical employees, guards,

professional employees and supervisors as defined in the Act.

The Regional Director also found that the distributors were "employees" under section 2(3); 29 U.S.C. 152(3) of the Act. Arguing that the distributors are independent contractors rather than employees, the Company moved to have the Board reopen the representation hearing. That motion was denied on November 15, 1967 and a subsequent motion for reconsideration was denied on December 4, 1967.

On January 4, 1968 the Regional Director conducted an election in the bargaining unit which he had found appropriate. The Union won that election by a vote of 63 to 31 and, on January 23, 1968, overruling the Company's objections to the election, the Director certified Local 200 as the distributors' collective bargaining representative.

An unfair labor practice proceeding ensued as a result of a complaint by the Union and on March 3, 1970 in a decision reported at 181 N.L.R.B. No. 62 the Board found that the Company violated § 8(a)(1) and (5) of the Act by refusing to recognize and bargain with Local 200, which had been certified as the exclusive collective bargaining representative of the distributors, by refusing to bargain with the Mailers and by unilaterally changing conditions of employment after Local 200 had been certified. The Board also found that the Company violated § 8(a)(1) and (3) of the Act by other discriminatory actions taken against the distributors with the intention of discouraging union membership and activities. The Board issued a bargaining order, as well as a traditional cease and desist order. It also ordered reinstatement of distributors discriminatorily terminated and that they be made whole for compensation which had been withheld from them by the Company.

Decision

The principal question at issue is whether the Board's finding that the distributors were employees, and not independent contractors, under section 2(3); 29 U.S.C. § 152(3), is supported by substantial evidence. Subsidiary to this are the claims of discriminatory discharge. We find substantial evidence in the record in support of the Board's findings that the distributors are employees and that twelve of them were discriminatorily discharged because of union activity. Accordingly we grant enforcement of the Board's orders.

Since *N.L.R.B.* v. *United Insurance Company,* 350 U.S. 254 (1968) it has been settled that general agency principles are to be applied in distinguishing between "employees" under section 2(3) and "any individual having the status of an independent contractor." The Supreme Court held that the N.L.R.B.'s determination that debit agents of an insurance company were "employees" under the common law of agency should have been enforced by the Seventh Circuit. In *News Syndicate Company, Inc.,* 164 N.L.R.B. 422, 423 (1967) the Board articulated the agency test as follows:

> "In determining the status of persons alleged to be independent contractors, the Board has consistently held that the Act required application of the 'right to control' test. Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be acomplished the relationship is one of employment, while, on the other hand, where control is reserved only as to the result sought, the result is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative."

Thus we turn to the factual background of the relationship between the "distributors" and the Herald Company in order to assess "the total factual context . . . in light of the pertinent common-law agency principles." *N.L.R.B.* v. *United Insurance Co., supra,* 390 U.S. at 258.

The Herald Company prints, sells and distributes The Herald Journal, a daily evening newspaper and the Herald American, a Sunday paper. Through an operating division, it also publishes a daily morning paper, The Post Standard. To distribute these papers in Syracuse and the surrounding area, the Company engages over 100 distributors. Since 1947 each distributor has received a franchise contract from the Company, and in arguing that the distributors are no longer employees, the Company places great emphasis on the terms of these contracts which explicitly state that the distributor occupies at all times the position of an independent contractor and controls "all ways and means relating to the proper performance and completion of the contract."

Both the Company and the Board point to a myriad of facts to support their opposing positions regarding the status of the distributors. The Company relies principally on the following facts: The franchise contracts, as redrafted in 1965, give the distributors the right to distribute the newspapers within an exclusive territory. They state that personal performance of the distributors' contractual obligation is not required; as a result, they are free to hire substitutes and to select delivery boys to work on routes which they establish. Distributors have considerable latitude in planning their own work schedules. They decide whether or not to extend credit to their customers and bear the risk of non-payment. They provide motor vehicles and other equipment at their own expense and receive no vaca-

tion, holiday, or fringe benefits from The Herald. They purchase their own accident insurance and are responsible for their own bookkeeping.

A distributor's income consists primarily of the difference between the wholesale rate at which he purchases the papers and the resale rate at which he sells the papers to his carriers. The wholesale rate is prescribed by the terms of the individual contracts; there is no uniform wholesale rate. Since 1965 the form contracts have set forth the retail rates as well as the wholesale rates and before that time the Company reserved the right to set resale rates.

Some of the distributors have been permitted to hold other jobs in addition to their distributorships and to distribute other newspapers along with The Herald's papers. On occasion, the distributors have acted in competition with the Company. It has been customary for distributors to purchase calendars from the Company each year at Christmas time for distribution by their carrier boys. In 1965 and 1966 the distributors had their own calendar published and distributed it in competition with the Company's own calendar.

The Company gives much emphasis to the fact that the distributors are free to sell or transfer their franchises and have done so in many instances without any Company intervention. The contracts give them the right to sell their franchises subject to The Herald's right to purchase within 30 days at the same price; but the Company has seldom exercised its right of first purchase. The record shows that since 1947 more than 165 transfers have occurred. Many distributors have received in the neighborhood of $10,000 for their franchises, and a few have received as much as $17,000. Furthermore, a few distributors have been able to devise their franchises to their widows,

and in one or two instances the widows have continued to run them. The Company takes the position that it has little control over the sale or transfer of the franchises and no control over their value.

On the other hand, in making its argument that the distributors are "employees," the Board focuses principally on the following facts: The Company determines the geographical boundaries of the territory to be serviced and draws up a schedule for the pickup and delivery of the newspapers. It requires distributors to submit to it lists containing the names and addresses of all of their customers and carrier boys. The Company often gives instructions directly to carrier boys and in a few instances has instructed distributors to change or discharge them. Distributors work under the jurisdiction of the Herald's circulation department and four district supervisors who work directly in the field where they investigate delivery problems and participate in their resolution. The district supervisors sometimes contact subscribers to determine whether or not distributors have been following Company instructions.

Customer complaints are often directed to the circulation department rather than to the distributors. When the department receives a complaint, it notifies the distributor and requires that he investigate it. If the complaint concerns the non-delivery of a paper within the city limits, the Company may service the customer by delivering the paper itself. It then levies a 25 cent charge on the distributor unless he can convince the Company that he should not be charged. The Herald regularly communicates with the distributors concerning complaint handling as well as other matters such as stop and start orders, inserts, and supplements to the newspapers. To deal with these matters, it

inundates the distributors with instruction letters, memoranda, telephone calls, and requests for office meetings.

The Herald runs numerous promotional contests in which the distributors' participation is encouraged to the point where it is compelled. As a part of its promotional program, it sends canvassers into the distributors' territories to secure new subscription orders, and the distributors are expected to provide carrier boys to assist the Company's canvassers. The Company pays the canvassers, carrier boys, and distributors for their participation in the canvass and the amount paid depends upon the success of the canvass and the increase in circulation.

Moreover, the evidence indicates that the Company has substantial control over the distributor's immediate income as well as some control over the value of the distributorships. The Company sets limits on their compensation by establishing "wholesale price ceilings" in the franchise contracts. The ceilings have the effect of increasing the wholesale price of the papers to the distributors when their purchases rise above their normal draw. Even more significant, the Company frequently awards bonuses and subsidies as well as promotional monies, and these extracontractual payments are an important part of the distributors' income. By manipulating the extracontractual payments and fluctuating its wholesale price ceilings, the Company is able to control the immediate earning power of the distributors and regularly exercises this control. The record shows that the Herald also has some control over the value of the franchises. It can refuse to renew the franchise contracts—many of which are for short terms—and by threatening refusal to renew, can decrease the value of the franchises. However, at least in the past, even those distributors who have

received non-renewal notices have been able to obtain substantial proceeds as a result of the sale of their franchises.

After examining the record of the twenty-eight day representation proceeding, the Regional Director concluded that although the distributors do have "a proprietary interest" in their franchise, they are employees under section 2(3) of the Act rather than independent contractors. Concerning the relationship between The Herald and its distributors, he wrote:

> . . . the record clearly shows that in accomplishing the distribution of its newspaper, an integral part of its operation, the Employer has maintained control over the distributors' earnings and the manner and means of accomplishing the results . . . . The record shows that the distributors are not controlled by self-determined personal investment expenditures and market conditions, but are controlled by the Employer.

The Board accepted the Regional Director's finding that the distributors are employees under the Act and denied the Company's motion to reopen the representation hearing.

We find substantial evidence to support the Board's conclusion that the Company has the authority to, and does, exercise supervision over the distributors' performance of their duties and that the Company can control the value of the distributorships as well as the immediate incomes of distributors. This alone appears to be a sufficient basis to support the Board's finding that the distributors are employees rather than independent contractors and are entitled to the protection of the National Labor Relations Act.

Moreover as in *N.L.R.B.* v. *United Insurance*, the very least that can be said for the Board's decision is that it was "a choice between two fairly conflicting views," and, as Mr. Justice Black stated in that case, "Such a determination should not be set aside just because a court would as an original matter, decide the case the other way." 390 U.S. at 260 (1967); see also *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951). We hold therefore that the Board did not err in finding that despite a proprietary interest in their franchise contracts, The Herald's distributors are employees under section 2(3); 29 U.S.C. 152(3) rather than independent contractors.[1]

The Company further argues that the Board's Findings that it violated sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act are not supported by substantial evidence and it

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[1] The Company cites the recent decision of the Board's Regional Director for the 9th Region in *Scripps Company as Publisher of the Cincinnati Post & Times Star* and the *Cincinnati Newspaper Guild Local 9 of the American Newspaper Guild*, 9-RC-8798 (1971) where the Director found that the thirteen country route drivers for the Cincinnati Post are independent contractors rather than employees under the N.L.R.A. The *Scripps* case is factually distinguishable from the instant case since the Cincinnati Post's country route drivers have exclusive control over the conduct of their business in addition to a proprietary interest in their franchises. Their franchise contracts have never been terminated at their employer's initiative, and their employer has never precluded them from assigning their rights under the contracts to persons of their own choosing. They are compensated on the basis of negotiated rates, and receive no large extracontractual payments which are within the discretion of their employer such as bonuses, promotional benefits, or subsidies. They are not required to attend any company meetings; nor are they required to attend meetings with employer representatives to discuss distribution problems. In contrast, The Herald Company has frequently terminated distributorships at its own initiative (in some instances by refusing to renew contracts for a limited term), has regularly given large amounts of extracontractual compensation which are entirely within its discretion, has compelled its distributors to participate in a myriad of "company" activities including extensive promotional campaigns, and has supervised the resolution of many of its distributors' delivery problems.

seeks to set aside the Board's order that it reinstate twelve distributors who were discriminatorily terminated and that it make them whole for the losses which they suffered as well as the Board's order that it must bargain with the Syracuse Mailers Union No. 73. We find in the record substantial evidence to support the Board's finding of discriminatory terminations and other unfair practices. The affirmative remedies which the Board ordered here pursuant to its authority under section 10(c) of the Act—its reinstatement order, its compensatory order, and its bargaining order—were all well within the remedial authority which has been vested in the Board by Congress. *N.L.R.B.* v. *J. H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258 (1969); *F. W. Woolworth Co.* v. *N.L.R.B.*, 121 F.2d 65, 66 (2d Cir. 1941); *N.L.R.B.* v. *Gissel Packing Inc.*, 395 U.S. 575 at 612 (1969).

The Union takes the position that the Board did not go far enough in shaping relief through which the Company would make amends for its unfair labor practices. The first addition which Local 200 seeks to the affirmative relief which has been ordered by the Board is compensatory damages both for itself and the distributors for the Company's failure to bargain with the Union, and it contends that the failure to bargain should relate back to the Union's first claim of representation on June 24, 1966. The Union seeks reimbursement to the distributors for "the monies and other contractual benefits they would have received had The Herald Company bargained with Local 200 upon its valid claim of representation dating back as far as at least June 24, 1966." The Board found that the failure to bargain took place only after the Union had been certified in January of 1968, rather than at the time of its first claim of representation in 1966. Since it thought that a bargaining order would be a sufficient remedy for petitioner's fail-

ure to bargain in 1968, it refused to award compensatory damages.

The award of monetary relief for an employer's failure to bargain is an unusual remedy which has been used very sparingly by the Board, and Local 200 is unable to show a similar factual situation where the Board has ordered such relief.[2] The Union cites the trial examiners' recommendations in *Ex-Cell-O Corporation* and *Zinke Foods* where they suggested monetary relief to compensate for the employers' failure to bargain earlier, but these cases do not support the Union's position because in each instance the Board rejected the trial examiners' recommendations of compensatory orders. *Ex-Cell-O Corp.*, No. 25-CA-2377 (N.L.R.B. Trial Examiner's Decision, March 2, 1967); *Ex-Cell-O Corporation,* 185 N.L.R.B. No. 20 (1970); *Zinke Foods, Inc.*, No. 30-CA-372 (N.L.R.B. Trial Examiner's Decision, December 18, 1966). *Zinke Foods, Inc.*, 185 N.L.R.B. No. 109 (1970). We agree with the Board that The Herald's failure to bargain occurred after it was certified in January of 1968 rather than in 1966 when Local 200 made its first claim of representation and we find that

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[2] In *N.L.R.B.* v. *Tiidee Products, Inc.*, 426 F.2d 1243 (D.C. Cir. 1970), the Court of Appeals for the District of Columbia remanded the case to the Board to ascertain whether the bargaining order which the Board had ordered was sufficient to make amends for the Company's failure to bargain earlier, and the Court directed the Board to order monetary relief if on remand it concluded that the bargaining order was not, by itself, a sufficient remedy. However, even *Tiidee Products* offers little support for Local 200's position in the instant case because there the employer, as a delaying tactic, refused to bargain with an already certified Union on grounds which the District of Columbia Circuit found to be "manifestly unjustifiable" whereas, in contrast, The Herald Company may have had some doubt regarding its responsibility to bargain with Local 200 in 1966, two years before the Union was certified.

the Board did not err in failing to order the Company to pay monetary damages for its failure to bargain in 1968.[3]

Local 200 presses two additional claims for monetary damages. First, it claims that the Board erred in failing to order The Herald to reimburse those employees who were forced to pay for Thanksgiving newspapers in 1965. The Thanksgiving edition of the Company's evening news papers was delayed as a result of a mechanical failure of the presses, and many copies were received by distributors two or three hours late. Due to the distributors' late receipt of the newspapers, some of the carrier boys did not get them until after 7:00 P.M. and refused to deliver them. Distributors who were members of Local 200 refused to pay the Company for these newspapers because of their inability to convey them to the customers.

The Herald took no immediate action against these distributors, but the Union contends that in a few instances, their refusal to pay the Company for the papers in addition to their other Union activities led to their discharge a year or two later. The trial examiner made no specific recommendation concerning The Herald's obligation to reimburse employees who paid for the Thanksgiving newspapers. He merely asserted that the Company should "make whole any and all employees who have suffered loss of subsidies, bonuses, promotion moneys or other emolu-

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[3] The Union's argument that the failure to bargain should relate back to its first claim of representation on June 24, 1966 rather than the date of election certification in January of 1968 is unpersuasive. The Union's first claim of representation was based on authorization cards, and a certification election is generally thought to be a "preferred" method of ascertaining whether a Union has majority support. *N.L.R.B.* v. *Gissell Packing Co., supra,* 395 U.S. at 602 (1969). Due to the fact that The Herald may have had doubts concerning its duty to negotiate when it was first presented with the authorization cards in 1966, we agree with the Board that the failure to bargain occurred only after Local 200 had been officially certified in 1968.

ments of value as a result of what has been found to be respondent's discrimination against them."

The Union's final claim is that the Board erred in its failure to require the Company to grant an increase to those employees who were not given a two cent increase in 1967. On October 27, 1967 the Company sent a form letter to the distributors which indicated that the price of the paper would be raised to 10 cents per copy, but that letter also gave them a new option: each distributor was offered an additional 2 cents per paper for one day per week if he would deliver the complete Sunday paper with all its supplements on the day of publication and would perform a minimum of 52 inserts per year. Every distributor was given the option of signing this agreement and seventy of them did so. Those who did not sign received no extra compensation; and those who did realized approximately $50 additional income per week. As with the Thanksgiving day newspapers, the trial examiner made no specific recommendation concerning The Herald's liability to those distributors who had refused to sign the two cent agreements.

Although the Board adopted the trial examiner's compensatory requirement for the benefit of all employees who had been the object of discrimination because of their union activities, it found that "the make-whole requirement is not intended to include either the 2-cent increase which was given to some distributors and not other distributors when the Respondent raised its newspaper price, or for failure to deliver newspapers on Thanksgiving Day 1965, since there is no showing that the Respondent's treatment of distributors in these matters was discriminatorily motivated." In each episode The Herald's conduct appears to have been motivated by business considerations rather than any anti-union animus. No immediate action was taken against distributors who refused to pay for the

Decision

Thanksgiving newspapers and the Union's allegation that the refusal to pay was connected with later discharges appears to have no factual basis. Moreover, the 2 cent increase was an option which was made available to all employees and those who did not choose to take advantage of it have no cause for complaint now. We find no merit to the Union's contention that the Board erred in failing to compensate the employees in connection with these matters.

We find that the parties' other contentions are without merit. Enforcement is granted.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

181NLRB No. 62 D-3527
Syracuse, N. Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE HERALD COMPANY — Cases 3-CA-2992, 3-CA-3193, 3-CA-3240, 3-CA-3390, 3-CA-3486, 3-CA-3557

and

BUILDING SERVICE EMPLOYEES, INTERNATIONAL UNION, LOCAL NO. 200, AFL-CIO

THE POST STANDARD COMPANY, INC. — Case 3-CA-3283

and

BUILDING SERVICE EMPLOYEES, INTERNATIONAL UNION, LOCAL NO. 200, AFL-CIO

THE HERALD COMPANY — Case 3-CA-3179

and

SYRACUSE MAILERS UNION NO. 73

DECISION AND ORDER

On June 20, 1969, Trial Examiner Thomas F. Maher issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative

action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the Charging Party filed exceptions and briefs, the Respondent filed an answering brief and a supplemental memorandum.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.[2] The Board has con-

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[1] Respondent's request for oral argument is hereby defined as the record, the exceptions and briefs adequately present the issues and positions of the parties.

[2] The Respondent excepts to the refusal of the Trial Examiner to permit it to litigate the employee status of the distributors in the unfair labor practice proceeding. We find that such refusal was properly denied, as the issue has been previously considered and decided by the Board by our denial of review of the Regional Director's Decision and Direction of Election on November 14, 1967, and by our denial of review of the Regional Director's Supplemental Decision certifying the Union as the collective-bargaining agent in an appropriate unit of the Respondent's distributors on February 12, 1968, in Case 3-RC-3965.

Upon reexamination of the entire record and briefs and exceptions in Case 3-RC-3965, and the Respondent's exceptions and brief, and supplemental memorandum in the above proceeding, including offers of proof of alleged newly discovered, or previously not available evidence, we reaffirm our adoption of the Regional Director's Decision and Supplemental Decision in these matters. We again conclude that the Respondent maintains control over the manner and the means of the work and the results to be achieved of the distributors involved herein and that such distributors are employees of the Respondent and are not independent contractors.

The following inadvertent errors in the Trial Examiner's Decision are corrected: TXD - 45, line 33, "time" should be "property"; TXD - 25, fn. 33, line 45, "July 12, 1967" should be "July 12, 1966".

sidered the Trial Examiner's Decision, the exceptions and brief, and the supplemental memorandum, and the entire record in this case, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner insofar as they are consistent with this Decision and Order.

1. We agree with the Trial Examiner that the Respondent placed an unlawful condition on bargaining in negotiating with the Syracuse Mailers Union No. 73, the exclusive bargaining representative of Respondent's mailing room employee, regarding the addition of situation holders. We find that the Respondent's conditioning bargaining with the Mailers upon its agreement not to seek the placement of Frey in the mailroom dealt with working conditions, a mandatory subject of bargaining, and that the condition was illegally motivated. However, in finding that the Respondent so qualified its agreement to add new jobs in the mailroom, we rely upon the credited testimony of Chapel Chairman Lanza and Union President Stone. Although, unlike the Trial Examiner, we do not rely upon the testimony of Respondent's President Rodgers in this regard, we find that Rodger's admissions, as set forth in the Trial Examiner's Decision, support the Trial Examiner's credibility findings and conclusions. Therefore, we adopt the conclusions of the Trial Examiner that Respondent thereby refused to bargain with the exclusive representative of its mailroom employees in violation of Section 8(a)(5) and (1) of the Act.[3]

2. The Trial Examiner found that the Respondent at all times between June 24, 1966, and January 23, 1968, the date the Building Service Employees International Union, Local No. 200, AFL-CIO, was certified as the majority representative of the Respondent's distributors, the Union

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[3] Cf. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342.

represented a majority of the distributors on the basis of valid authorization cards. He further found that the Respondent's conduct, as set forth in his Decision, of refusing to recognize the Union's majority status or to bargain with it on behalf of the distributors since June 24, 1966, was violative of Section 8(a)(5) and (1) of the Act. The Respondent contends that the Trial Examiner's findings which are based upon events occurring more than 6 months prior to February 29, 1968, the date that a charge alleging a specific violation of Section 8(a)(5) was filed, are barred by Section 10(b) of the Act. The Respondent points out that the original unfair labor practice charge filed on July 12, 1966, and subsequent amendments thereto, as well as other charges filed, referred specifically and inferentially only to alleged Section 8(a)(1) and (3) violations, and that a violation of Section 8(a)(5) can be founded only upon the February 1968, charge. We agree with the contentions of the Respondent. Accordingly we find that the Trial Examiner's findings based upon events occurring more than 6 months prior to February 29, 1968, are barred by Section 10(b) of the Act and are hereby overruled.[4]

However, as the Union was certified as the majority representative in an appropriate unit of employee-distributors on January 23, 1968, pursuant to a Board-conducted election, we find in agreement with the Trial Examiner, that the Respondent's refusal to recognize the Union's majority status, or to bargain with the Union since the date of its certification, violated Section 8(a)(5) and (1) of the Act. Consequently, our overruling the findings of the Trial Examiner of Section 8(a)(5) violations prior to the Union's date of certification does not affect the Trial Examiner's

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[4] See *Knickerbocker Mfg. Co.*, 109 NLRB 1195, 1196-7; *N.L.R.B.* v. *IBS Mfg. Co.*, 210 F. 2d 634, (C.A. 5).

ultimate finding that the Respondent has refused to bargain with the Union as the exclusive bargaining representative in the unit of employee-distributors found appropriate by the Board or the remedy provided in his Decision.[5]

3. By way of remedy, the Trial Examiner recommended, *inter alia,* the Respondent reinstate the contracts of those distributors against whom the Respondent was found to have discriminated, and "to make them whole" for such compensation as they may have lost as the result of Respondent's discrimination against them. The Trial Examiner also recommended that the Respondent make whole those employees from whom promotion money and other compensation was discriminatorily withheld. The Charging Party in its exceptions and brief has requested clarification of the meaning of the make whole requirement as it applies to certain discriminatees, and to provide for those benefits that would have inured to the distributors had the Respondent not failed to bargain in good faith. We agree with the Charging Party that the make whole requirement includes adjustments such as promotion money

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[5] In view of our decision herein, we find it unnecessary to, and do not, pass upon the validity of the authorization cards used as a basis to support the Trial Examiner's finding that the Union enjoyed majority status on and after June 24, 1966. Nor do we find it necessary to pass upon the validity of the Trial Examiner's bargaining order based upon such authorization card showing to the factual situation herein.

The Trial Examiner found that certain specific instances of Section 8(a)(5) and (1) violations occurred on and after June 24, 1966, the date he found the Respondent was obligated to bargain with the Union. To the extent that the Respondent has engaged in such conduct after the Union's certification on January 23, 1968, e. g., unilateral promulgation of new and revised contracts, the withholding of promotion money, refusing to bargain regarding inserts, the cancellation of "turkey awards" without prior consultation with the Union, we affirm the Trial Examiner's findings in this regard.

and subsidies withheld from discriminatees Malvasi and Smith, whose territories were in a deteriorating condition, the same as was paid to nonunion adherents in similar situations. We find that this issue was fully litigated and closely related to and contained within other matters alleged in the complaint, and that the discriminatory treatment of Malvasi and Smith in this regard was violative of Section 8(a)(1) and (3) of the Act. However, the make whole requirement is not intended to include either the 2-cent increase which was given to some distributors and not other distributors when the Respondent raised its newspaper price, or reimbursement to those distributors who were charged for failure to deliver newspapers on Thanksgiving Day 1965, since there is no showing that the Respondent's treatment of distributors in these matters was discriminatorily motivated. We also deny the Charging Party's request for remedies beyond those provided by the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and hereby orders that Respondent, The Herald Company, Syracuse, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

Footnote 58 should be amended to read as follows:

In the event this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the

Relevant Portion of Trial Examiner's Decision and Recommended Order

United States Court of Appeals enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. Mar. 3, 1970

John H. Fanning,	Member
Gerald A. Brown,	Member
Howard Jenkins, Jr.,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

RELEVANT PORTION OF TRIAL EXAMINER'S DECISION AND RECOMMENDED ORDER

TXD-334-68
Syracuse, N. Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

(SAME TITLE)

JOSEPH LUKSCH, ESQ., of Buffalo, N.Y., for the General Counsel.

BOND, SCHOENECK and KING, BY FRANCIS D. PRICE, ESQ., and RAYMOND W. MURRAY, JR., ESQ., of Syracuse, N.Y., for the Respondent.

BLITMAN and KING, by BERNARD T. KING, ESQ., of Syracuse N.Y., for the Charging Unions.

TRIAL EXAMINER'S DECISION
Statement of the Case

THOMAS F. MAHER, Trial Examiner: Upon charges filed between July 12, 1966, and July 16, 1968 by Building

Relevant Portion of Trial Examiner's Decision and Recommended Order

Service Employees International Union, Local 200, herein referred to as Local 200 or the Union, against The Herald Company, and the Post Standard Company, Inc., referred to herein collectively as Respondent, and a charge filed on March 3, 1967 by Syracuse Mailers Union No. 7, referred to as the Mailers, against The Herald Company, the Regional Director for the Third Region of the National Labor Relations Board, herein called the Board, on December 28, 1967 issued a consolidated complaint against Respondent herein and thereafter, on August 5, 1968, issued a further complaint against Respondent, which, pursuant to my order at the hearing, was consolidated with these cases before me for hearing. Therein it was alleged that Respondent had violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151 *et seq.*), herein called the Act. In duly filed answers Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practices.

Pursuant to notice a trial was held before me on various days in June and September 1968 in Syracuse, New York, where all parties were present, represented by counsel and afforded full opportunity to be heard, to present oral argument, and to file briefs with me. All parties filed briefs on or about November 15, 1968.

Upon consideration of the entire record, including the briefs filed with me, and specifically upon my observation of each witness appearing before me[1] I make the following

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[1] I have considered the testimony of all witnesses, including those whose testimony I neither accept nor refer to. In evaluating the testimony of each witness I have relied specifically upon his demeanor and have made my findings accordingly. But, aside from considerations of demeanor, I have taken into account inconsistencies and conflicting evidence, my failure to refer to any of these is not to be deemed a failure on my part to have duly considered it. *Bishop and Malco, Inc.*, 159 NLRB 1159, 1161.

Relevant Portion of Trial Examiner's Decision and Recommended Order

Findings of Fact and
Conclusions of Law

I. The Issues

1. The single employer status of The Herald Company and Post Standard Company, Inc.

2. The status of the Association as a labor organization.

3. The employee status of the distributors as determined in a related representation case.

4. The agency or supervisory status of William Dempsey.

5. Evidence of interrogation, threats, promises of benefits, implied surveillance, solicitation of surveillance, promulgation of a no-solicitation rule, solicitation of withdrawals from the Union, warning of refusal to bargain and the solicitation of individual agreements, as unlawful interference, restraint and coercion.

6. Termination of distributors' agreements as discriminatory discharges.

7. Withholding of loans, bonuses, promotion money and subsidies as unlawful discrimination.

8. Majority status of the association and the Union based upon authorization cards.

9. Effect of Board certification of the Union upon Respondent's refusal to bargain.

10. Unilateral actions as refusal to bargain.

11. Imposition of condition that Joseph Frey not be hired as an unlawful refusal to bargain.

12. Creation of new job situations as a bargainable issue.

Relevant Portion of Trial Examiner's Decision and Recommended Order

II. The Business of the Respondent

The Herald Company, is admitted to be a New York corporation. The Post Standard, according to stipulations of the parties and the undenied testimony of Stephen Rogers, president and publisher of the Herald Company, is an operating division of the Herald Company. Each is engaged in the printing, sale and distribution of newspapers and related products at their plant in Syracuse, New York, and hold membership in or subscribe to interstate news services, publish syndicated features and advertisements of nationally sold products, from which each derives an annual gross revenue in excess of $500,000. Upon the foregoing I conclude and find that Respondents The Herald Company and The Post Standard Co., Inc., are engaged in commerce within the meaning of the Act.

With respect to the relationship of the foregoing Respondents as employers of the individuals involved herein a determination in this respect has been made by the Regional Director in his decision of July 19, 1968 in *The Herald Company and Building Service Employees International Union, Local No. 200, AFL-CIO,* Case No. 3-RC-3965.[2] Therein it was determined that the employees for

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[2] By order dated November 14, 1967, the Board denied the Employers' request for review of the Regional Director's Decision and Direction of Election. Thereafter, following the receipt and consideration of further briefs in the matter, the Board, on December 4, 1967, denied the Employers' Motion to Reconsider its earlier denial of request for review. Pursuant to the aforesaid Decision and Direction of Election an election was held in which Local 200 was selected by a majority of the Employers' distributors. On January 23, 1968 the Regional Director issued his Supplemental Decision overruling the Employers' objection to conduct affecting the results of this election; and on February 12, 1968 the Board denied the Employers' request for review of the Regional Director's Supplemental Decision.

whom the petitioning union sought representative status, being those distributors in the instant proceeding whose bargaining representative is alleged to have requested and been refused recognition and bargaining by the Herald Company,[3] were neither independent contractors nor supervisors as claimed by their employer, but employees within the provision of Section 2(3) of the Act. Upon the authority of this determination as it relates directly to Respondent's refusal to bargain with the representative of these individuals whose status had been litigated,[4] I conclude and find that the distributors of The Herald Company are employees within the meaning of the Act.

It has been stipulated and agreed between the parties that distributors of The Post Standard Co., Inc. have duties identical to those of The Herald Company and are subject to identical direction and control. I accordingly find and conclude that these distributors are also employees within the meaning of the Act.

From the credited testimony before me there is evidence of common ownership in the person of Mr. S. I. Newhouse, unified management and common direction with a centralized and identical labor policy administered under the direction and control of President Rogers. Moreover, the newspapers published by each are printed at a common plant facility and the Sunday edition of the newspaper has since May 1965 comprised a combined single edition. Accordingly, I conclude and find that the two organizations

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[3] Cf. *N.L.R.B.* v. *Sagamore Shirt Co.* 365 F 2d 898 (C.A.D.C.).

[4] *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 US 146, 162; *N.L.R.B.* v. *Sagamore Shirt Co., supra; N.L.R.B.* v. *Union Brothers Inc.* 403 F 2d 883 (C.A. 4)

constitute a single employer for all purposes in this proceeding.[5]

III. The Labor Organizations Involved

It is admitted by the parties and I accordingly conclude and find that Building Service Employees International Union Local No. 200, AFL-CIO, and Syracuse Mailers Union, No. 73 are each labor organizations within the meaning of Section 2(5) of the Act.

The Newspaper Distributors Association, herein called the Association, was an organization of the Respondents' distributors whom the Board, in Case No. 3-RC-3965 has determined to be employees within the provision of the Act.[6] It is evident from the testimony I have credited herein and the admissions of Respondents' officials, including President Rogers, that the Association, prior to its merger with Local 200, sought to represent its members in negotiations and discussions with the Respondents with regard to working conditions and terms of employment. I therefore conclude and find that the Association meets the requisite statutory criteria and is a labor organization within the meaning of Section 2(5) of the Act.

IV. The Unfair Labor Practices

A. *Introduction*

The dispute with which this proceeding concerns itself was generated by the contested status of the distributors

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[5] Upon my conclusion herein that the Respondents are a common employer and having found as I have herein *(infra)* that there is a single thread of illegal motivation centered in the common management of the enterprise I deny Respondent's Motion for Severance of the several cases before me.

[6] See *infra*

whose function it is to distribute the Respondents' newspapers. These distributors are in the following categories: City Distributors, Motor Route Distributors, Street Sale Distributors, Suburban Distributors and County Distributors.

After considerable hearing and litigation growing out of efforts on the part of the distributors to organize themselves and to be represented for the purpose of collective bargaining it was determined in Case No. 3-RC-3965, contrary to the position of Respondent, that these were not independent contractors nor supervisors as claimed, but employees. Accordingly, the Regional Director in his decision of July 19, 1967 directed an election be held to determine the representation of these employees in a bargaining unit appropriate for the purposes of collective bargaining described as follows:

> All city, motor route, street sales, country and suburban distributors employed by the Employer at Syracuse, and the central New York area, but excluding all other employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.

Thereafter on January 4, 1968 an election by mail ballot was held in which 63 of the 109 distributors selected Local 200 as their bargaining representative. The Regional Director, after considering timely objections to conduct affecting the results of the election, and rejecting allegations that there was additional and newly discovered evidence that would affect his earlier determination, certified Local 200 as the bargaining representative of the distributors in the unit described above. The Respondent thereafter filed with the Board its petition for review of the Regional Director's action and a motion for reconsideration, each of which

was denied by the Board. The matter was further pursued in the U.S. District Court which refused to enjoin the Union's certification. This refusal by the Court was thereafter sustained by the U.S. Court of Appeals for the Second Circuit in *The Herald Co.* v. *Vincent,* 392 F. 2d 354.[7]

It is apparent from the record that Respondent has never become reconciled to the distributors' efforts at self-help nor to the resolution of the attendant legal issues in their behalf. On the contrary, a climate of contention has pervaded all aspects of the relationship between management and employees and what follows herein will be an effort, gleaned from the credited testimony in the record, to describe this situation in objective perspective.

One further aspect of Respondent's contention with its employees and their certified bargaining representatives must be noted. As the controversy involving the distributors persisted, a further aggravation developed in the mail-

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[7] During the course of the hearing before me counsel for Respondent made repeated effort to inject the issue of the employee status of the distributors. For the well settled reason that such an issue, fully litigated in a representation proceeding, may not thereafter be relitigated in a subsequent unfair labor practice case which concerns the identical subject matter, in the same context, I refused testimony, after full opportunity for legal argument in support of such relitigation. Offers of proof have since been provided me and are incorporated in the record. After review of these I am persuaded that my original rulings excluding the evidence was correct. I accordingly reject the offers and reaffirm my rulings. *N.L.R.B.* v. *Sagamore Shirt Company,* 365 F. 2d 898, 904 (C.A., D.C.); *National Van Lines,* 128 NLRB 1272, 1278, fn. 4; *Pittsburg Plate Glass Co.* v. *N.L.R.B.,* 313 US. 146, 158.

Upon Order to Show Cause served upon all the parties, no valid cause being presented, the Regional Director's Decision and Direction of Election and his Supplemental Decision and Certification of Representation in Case No. 8-RC-3695 have been incorporated into the record of this proceeding and are reproduced as Appendix A and Appendix B, respectively, of this Decision.

ing room of The Herald over job assignments and seniority allocation under the current contract in force between Syracuse Mailers Union No. 73 and Respondent. This dispute concerned itself with alleged discrimination of a one-time employee in the mail room, Joseph Frey, Sr., who subsequently became a distributor and involved in the disputes in that area. Because of this relationship and the interrelated overtones touching each of the two areas of contention (*infra*, pp. 38-43) I permitted the continued consolidation of cases involving each issue and denied Respondent's motion to sever. A review of the record reaffirms my belief that these cases are inextricably connected and I now reaffirm my rulings in this respect.

[The rest of the Trial Examiner's Decision has been deleted]

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRD REGION

THE HERALD COMPANY,

Employer,

and

Case No. 3-RC-3965

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 200, AFL-CIO,

Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a

hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with these cases to the undersigned Regional Director.[2]

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

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[1] During the course of the hearing, the Employer moved that the hearing officer make credibility determinations and submit them to the Regional Director. The hearing officer referred the motion to the Regional Director. As representation proceedings under Section 9 of the Act are investigations which are informal and nonadversary in nature and such determinations are not necessary to the issuance of a Decision herein, I find no merit to the Employer's motion. Accordingly, it is hereby denied.

[2] The Petitioner requested on March 8, and April 5, 1967, that the transcript of the hearing herein be corrected in certain respects. On May 23, 1967, I issued an Order to Show Cause that the Employer, in writing, on or before June 1, 1967, show cause, if any there be, why the transcript should not be corrected as requested by the Petitioner. The Employer did not reply to this order. The transcript is hereby corrected as set forth in attachments "A" and "B".

4. The Petitioner seeks a unit of all city, motor route, store sales, suburban, and country newspaper distributors employed by the Employer in the central New York area, or in the alternative any unit found appropriate herein. The Employer alleges that its newspaper distributors are independent contractors and therefore do not constitute an appropriate unit for the purposes of collective bargaining. The Employer further contends that if the newspaper distributors are found to be employees, it then takes the position that some of the newspaper distributors should be excluded from the unit as supervisors within the meaning of the Act. There is no history of collective bargaining for the distributors involved herein.

The Employer is engaged in the publication and circulation of a daily and Sunday newspaper in Syracuse and the central New York area. The Employer engages approximately 106 distributors for the purpose of distributing its newspaper. These distributors are in the following categories:

City distributors, approximately 23 in number, for the most part distribute newspapers to carrier boys at one or more stations or designated street corners.[3] The carrier boys make house-to-house delivery to the subscribers in the City of Syracuse and the immediate surrounding area.

Motor route distributors, about 33 in number, primarily deliver to subscribers house-to-house in rural areas, placing the stick newspaper in a tube from their automobiles.[4]

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[3] The distributor owns or rents the station.

[4] Stick is a prewrapped newspaper that is placed in a tube which is a receptacle furnished by the Employer and placed in front of the home for rural delivery, so the motor route distributor can place the stick newspaper into the receptacle from his automobile.

Some of the motor route men also have carrier boys to whom they distribute newspapers.

Street sale distributors, approximately five in number, deliver newspapers to dealers, such as drug stores, news stands, grocery stores, hotels, and customers of this nature within the City of Syracuse.

Suburban distributors, about 15 in number, deliver newspapers outside of the city and the motor route distributor's area, up to approximately a 35-mile radius of Syracuse. They deliver the papers to carrier boys and dealers and they also operate a motor route type of operation and deliver papers to carrier boys and dealers within their territory.

Country distributors, about 35 in number, deliver newspapers outside the 35 mile radius of Syracuse and are engaged generally in the same type of operation as a suburban distributor.

Distributors involved herein are under the jurisdiction of the Employer's circulation department which is under the direction and supervision of a circulation manager who is directly responsible to the publisher. Under the immediate supervision of the circulation manager are four district supervisors, each of whom are in charge of the circulation and distribution of the newspaper in a specified geographical area. Also employed in the circulation department are clerks and typists, a complaint clerk who receives telephone calls as to the delivery of paper, and canvassers (solicitors) who canvass and solicit door-to-door newspaper subscriptions. The Employer also utilizes telephone solicitors, who solicit subscriptions over the phone, and two complaint men who deliver the newspaper within the city limits to customers who report they have not received the news-

paper. Both the complaint men and telephone solicitors are under contractual relation with the Employer. Also under the direction of the circulation manager is a transportation manager and two assistants who are responsible for handling the newspapers at the Employer's dock and distributing them to the distributors.

The Employer prints five editions each day except Saturday and Sunday. The newspapers are picked up at the Employer's dock by independent truckers and by some of the distributors, according to a schedule established and periodically revised by the Employer.[5] The independent truckers and some of these distributors transport bundles of newspapers to the distributors at designated locations. Although it is alleged that the distributor pick the location where the newspapers are to be delivered, the location is subject to the approval of the Employer and is approved only if the location is convenient. The distributors and independent truckers who transport bundles of newspapers to distributors are paid by the Employer for the service.

Prior to 1947, the distributors were employees of the Employer and were called district managers. In 1947, the Employer initiated a franchise system for the distribution of its newspapers, which is still in existence. The district managers' title was changed to distributor (also called news dealers in early contracts.) At that time, the district managers' employment was terminated and each was asked to sign a franchise agreement.[6] Each of the distributors executed a franchise agreement which was for a definite term, the motor route franchise agreement for a

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[5] The parties agree, and I find, the independent truck drivers are not employees of the Employer and are excluded from the unit.

[6] The agreement provided for $1.00 consideration for the distributorship.

term of three years and the city distributors for a term of five years. The territory of the distributor was established by the Employer and was substantially the same as that he serviced as district manager. The work performed by the distributor was substantially the same as he performed prior to the execution of the agreement, that is, the distribution and delivery of newspapers to carrier boys, dealers and subscribers, and collecting monies. District managers were not liable for the nonpayment by a customer, but as distributors they are responsible for nonpayment by a customer.

Since 1947, as each contract reached its termination date the Employer and the distributor executed a new form agreement for a definite term. The term and condition of each succeeding franchise agreement have varied in certain respect. All of the franchise agreement forms, with blank spaces for the distributor's name and termination date, have been drafted by the Employer without negotiation with the distributor. In 1965, the distributors' attempt to negotiate the franchise agreement was refused by the Employer. The distributors also submitted a proposed franchise agreement to the Employer in 1965, which was rejected. When the most recent contract franchise agreement form was drafted by the Employer in 1965, all of the distributors were requested by the Employer to execute the new form agreement, notwithstanding that some of the distributors had time to run on the existing contract. A majority of the distributors have signed a new form agreement which runs for terms of from five to seven years. The distributors were told that they had to sign the new form of agreement and if they did not execute the new agreement, they had the choice of either selling their franchises allowing them to lapse at the termination date.

Regional Director's Decision and Direction of Election

The 1965 franchise agreement provides: (a) that the Employer assigns and transfers to the distributor, the rights and privileges to sell and distribute newspapers within a specified territory for a definite time so long as the distributor complies with the terms of the agreement; (b) that the Employer agrees to sell its newspapers to the distributor and the distributor agrees to purchase the newspapers needed to service all the customers within the territory, at a wholesale and for a resale rate to carrier boys and dealers established by the Employer in the appendix to the agreement, and in the event the retail price of the newspaper increases, the wholesale price may be determined and increased by the Employer, but in no event would the wholesale rate increase result in a monteary difference to the distributor less than the present difference between the wholesale and resale price;[7] (c) that the distributor shall promote the sale of the newspaper and make every effort to increase the volume of business by securing new subscribers; (d) that the Employer, from time to time, shall adopt such sales promotion programs as it deems necessary and supply the distributor with promotional information of such programs, and if the newspaper adopts any promotional devices involving collection of insurance premium and/or magazine distribution, the distributor shall collect or cause to be collected, the payment of premiums or applications when such are due;[8] (e) that the distributor maintains the right to sell or distribute any newspaper or publi-

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[7] Since 1947, the Employer has, on several occasions, unilaterally increased the wholesale and resale rate of the newspapers.

[8] The contracts prior to the 1965 contract did not provide for the collection of insurance monies or premiums. In recent years the distributors protested the collection of insurance monies and it became an issue between the distributors and the Employer.

cation within his territory; [9] (f) the distributor shall diligently and efficiently make deliveries of the complete newspaper intact, including preprints, supplements, and inserts;[10] (g) that the distributor shall take delivery of the newspaper at places and times designated by the Employer; (h) that the distributor shall post a bond equal to two weeks' bill;[11] (i) that if the distributor, during the life of the agreement, desires to sell, assign, or transfer his rights under the agreement, he is to give the Employer a thirty (30) day notice in writing, stating the sale price, purchaser, and wholesale rate of the paper, and the Employer has a thirty (30) day option to purchase the distributorship; (j) that the distributor shall submit quarterly reports of customers for its audit Bureau of Circulation (this does not appear in the street sales distributors' franchise agreement form contract); (k) that the distributor, at his expense, will obtain and maintain in force such insurance as required by law to carry on the distributorship; (l) that the means and methods of collection, delivery and distribution of the newspaper shall be in the exclusive control of the

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[9] There are two newspapers in the City of Syracuse, one is a morning paper and one is the evening and Sunday paper involved herein. Both of these newspapers are owned by the Employer and printed at the same premises. Therefore, the only other newspaper possible for the distributors to handle would be the other newspaper of the Employer. Some of the distributors have distributorships for both the morning and evening newspapers.

[10] Prior to the 1965 contract, this provision did not appear. It first appeared in the 1965 form agreement. In the past several years, there has been an issue between the Employer and the distributor as to the distribution of the preprints, supplements, and inserts.

[11] Prior to the 1965 agreement the amount of bond to be posted was by agreement between the parties. At one time the Employer paid interest on the bond monies deposited with it. However, without consultation with the distributor, the Employer discontinued the paying of interest on bond monies on deposit.

distributor and not subject to control and supervision by the Employer, and the distributor occupies, at all times, the position of independent contractor, controlling all ways and means relating to the proper performance and completion of the contract; (m) that the distributor will purchase and maintain and bear the expense of any vehicle required in the performance of operating the distributorship; and (n) that the Employer will not be responsible for any expense of the distributorship's operation, social security, taxes, workmen's compensation, or the like.

In addition to the difference between the wholesale and resale rate of the newspaper, the distributor income is derived from several other sources: (a) promotion money; (b) check of 50 cents per hundred draw on Wednesdays; (c) transportation checks; (d) insurance premium money; (e) $5 checks for daily inserts; and (f) other subsidies, paid by the Employer to the distributors. None of the latter is included in the franchise agreement.

The most recent contract of the Employer sets forth the wholesale and resale price of the paper. Prior to that time, the contract just set forth the wholesale rate. However, the record shows that by a letter of the Employer, dated in November 1957, other memos of the Employer, and conversations between the Employer and distributors, the Employer had always established the resale price of the newspaper. Although some of the distributors have for several years charged carrier boys a resale rate higher than established, the Employer had knowledge of the higher rate. In 1947 when the franchise agreements were established, the Employer, taking into consideration the distributors' anticipated expense and the size and type of the territory, established wholesale and resale rates so the distributor would receive a certain income. In subsequent agreements, the Employer established ceilings in the contract, that is,

if the distributors' draw (the number of papers a distributor purchases) rose over a certain number, the wholesale price of the newspaper increased to the distributor. If a distributor reported that his income was decreasing because the area was deteriorating, the Employer told the distributor to bring in his expense records, and after looking them over, the Employer either lowered the distributor's wholesale rate or gave him a weekly subsidy to raise his income to keep the territory in operation. Also, when one distributor sold part of his franchise to another distributor, the Employer reduced the wholesale rate to the seller in order to make up for loss of profit for the part of the territory the seller sold. As a result of the method used by the Employer in 1947 in establishing the wholesale rate of the newspaper and its changing them for individual distributors over the years, the wholesale rates to the distributors are not uniform.

The Employer, for the purpose of increasing circulation and subscriptions, from time to time conducts various promotional programs and contests. These promotions and contests provide for so much money or prizes for new subscriptions obtained in a certain period of time. The Employer determines the number of promotions, the type of promotions, the amount of prize money or what the prizes will be, provides the prize money and prizes, and determines who is to participate in the promotion program or contest. Distributors have been expected and required to participate in the promotional activities. In the past year or so, the Employer discontinued promotional money to all except a few of the distributors. The Employer told some of the distributors who refused to sign the 1965 contract to sign it and promotion money would "flow like water."

In November of 1957, when the Employer raised the retail price of the newspaper, it increased the amount earned by

the carrier boys and the dealers but did not increase the income to the distributors. At that time it instituted a plan by which the distributors would receive 50 cents for every 100 papers draw on Wednesday. This was conditioned upon the distributor conducting training sessions with the carrier boys and conducting a weekly canvass to solicit new subscriptions. After that date this did not apply to distributors who purchased new distributorships or to new distributors. When one of the distributors was about to purchase a new distributorship and learned that the 50 cents per 100 he was receiving on his existing distributorship was going to be discontinued, he said he would not take over the new distributorship, and the Employer told him it would continue the 50 cents per 100 with the new distributorship. Although new distributors and those purchasing or transferring distributorships do not receive the 50 cents per 100 draw on Wednesday check, they are expected to conduct the training sessions and a weekly canvass.

Some of the distributors own their own trucks and pay their truck expense.[12] However, when a distributor purchases a truck, the Employer gives him an interest-free loan and a weekly transportation check for the hauling of the newspapers. A portion of the weekly transportation check is for payment of the loan and the remainder is to cover the expense of operating the truck or a subsidy.

Since 1933, the Employer has available to subscribers an accident policy with a premium of 10 cents a week as a means of promoting newspaper subscriptions. The premium is billed to and collected by the distributor through the carrier boy. Although the contracts prior to 1965 stated

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[12] The Employer does not require the distributor to have its name on the truck.

nothing about the insurance policy or collection of the premium, the distributor has been obligated to collect the premiums. Up to 1959, the distributor got 1½ cents for each 10 cents premium collected. In 1959, the Employer, without consultation with the distributors, reduced this to 1 cent per 10 cent premium collected. In 1959, the Employer, without consultation with the distributors reduced this to 1 cent per 10 cent premium collected. When a policy is cancelled or a party moves, the insurance premium is still billed to the distributor for a period of three weeks until it is removed from the roll, and the distributor is liable for this premium. When one of the distributors complained that he lost money on poor-paying or cancellation of insurance policies, the Employer told him to "throw in a few extra orders" and get the money back that way.[13] When a policy is cancelled out, the distributor has to report in writing to the Employer the reason for the cancellation.

The Employer prepared a letter which stated that because of the added expense of operating the truck, there would be an additional five cent a week service charge, and had one of the motor route distributors deliver it to each of the subscribers in his territory. The letter indicated that it was from the distributor. The 5 cents was divided; 2 cents to the distributor and 3 cents to the Employer. Although the distributor protested he would lose money through the loss of subscribers, the Employer insisted he institute the service charge. As customers were lost, the service charge remained in effect about a week, and the Employer thereafter gave the distributor a weekly subsidy check to make up for the loss of income resulting from the loss of subscribers.

When papers are lost or stolen, the Employer replaces the papers without cost to the distributor, and the street sales distributor may return extra papers.

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[13] The distributor and the carrier boy each get so much for every new subscriber.

The franchise agreement states that the distributor may sell, transfer, or assign his distributorship. Since 1947 over 100 of the distributors have transferred or have sold their distributorships. As stated above, when a distributor is going to sell, transfer, or assign his distributorship, he must give the Employer a 30-day option to purchase the distributorship. At the time a sale is consummated, it is generally a three-party arrangement with the seller, purchaser, and a representative of the Employer present. The seller signs the release to the Employer, and the Employer executes a new agreement with the purchaser, usually for an extended period of time. Therefore, when a distributor is going to sell his distributorship, the value of the distributorship depends upon the Employer's agreement to renew or extend the present francise. When Zimmer, a distributor, was going to sell his franchise and buy another, he made arrangements to sell his distributorship to Irving for $10,000. However, the circulation manager told Zimmer that he was to sell it to Mr. Rothschild, who at the time was a district supervisor for the Employer, for a sum of $9,000, which Zimmer did. As a result, the Employer gave Zimmer a lower wholesale rate on the distributorship he was purchasing to make up the $1,000, and also gave Rothschild a lower wholesale rate on his papers in order to make up for a loss of severance pay. In 1957, the Employer wanted Meadvin, a distributor, to become a district supervisor. Mr. Irving, who at that time had a distributorship was called in and asked if he wanted to buy Meadvin's territory. After learning that Meadvin's gross was less than his, Irving asked why he should buy the territory and was told by the circulation manager that the territory was down because of summer vacation and there was more promotion money in this territory than in the former. The circulation manager told Irving that if there wasn't any increase in the income,

to come and see him at a later date, which Irving did. The circulation manager told Irving when he came in, that he would see what he could do about it. Later, the circulation manager told Irving he could do nothing for him. Thereafter, Irving put in extra orders on promotion that amounted to about $15 a week. In two recent incidents, the Employer would not renew the distributors' franchises, and they lapsed at the termination date. The Employer sold each of these territories for $15,000 and has offered this amount to the distributors less the expense of operating the territory until the new distributors took over. The Employer's circulation manager testified that when the contract terminates the customers are the property of the Employer and it can sell the customer list to a new distributor. In one instance, the Employer told a prospective purchaser of a franchise that the franchise grossed less than it did and thereby killed the sale. The Employer required one distributor to purchase a portion of another distributor's territory and told the prospective purchaser it would not allow the seller to sell for one cent less than $2000. Only a few franchises have been assigned where the Employer was not a party to the transaction.

The distributors must deliver to subscribers and place honor boxes (self-service news racks) in buildings if they want to or not, and regardless of whether or not it is profitable. In one instance, the papers were taken from the honor box and the money was not placed in the box, which resulted in a loss to the distributor. The Employer gave the distributor credit for the papers taken. The Employer has transferred subscribers from one territory to another, and when the distributor complained it would not be profitable to service the subscribers, the Employer told the distributor that if he did not service the subscribers, the Employer would put someone else in there who would.

The carrier boys are obtained by the individual distributors. The Employer, from time to time, runs ads for carrier boys and turns the replies over to the distributors. The number of carrier boys working with a distributor is determined by the distributor. Some of the country and suburban distributors have entered into contracts with submotor route distributors within their franchised territory. The contract is similar to that which the distributors and Employer executed.

The Employer issues instructions and memos to the distributors in sandwich bags attached to the key bundles, letters, telephone calls and personally, as to: (1) complaints-handling and making reports on them; (2) investigating and handling stop and start orders; (3) canvassing; (4) inserting preprinted inserts and supplements in the newspapers; and (5) handling and participating in promotional activities and contests.

The complaint (usually a customer not receiving the paper or the failing to start the delivery of the paper to a new subscriber) is a form which lists the customer's name and address and the nature of the complaint. The distributor is to investigate these complaints as well as stops, and make a report on them. The Employer has a means whereby canvassers receive a certain amount for each new order. These new orders are turned over to the distributor who is to check on the order to verify if it is a valid order or not and make a report to the Employer. The Employer employs canvassers for the purpose of obtaining new subscribers. In connection with this, the Employer notifies the distributors that he is to have a certain number of carrier boys available on certain nights to assist the canvassers. The Employer stated that the distributor is expected to participate in the canvassing. The distributors

are given detailed instructions on how to handle stop and restarts for subscribers on vacation. The Employer has preprinted supplements such as comic and magazine sections for the insertion in the Sunday paper, and advertisement sections for insertion in the daily and Sunday papers. Some of the preprinted advertising sections are furnished by the advertisers and the Employer receives a certain amount for inserting in each of the papers. These are printed by another company and delivered to the Employer who distributes them to the distributor in the same manner as the regular paper, but several days in advance, with instructions for inserting in the paper on a specific date. The distributor distributes the inserts in advance to the carrier boy for insertion in the paper on a certain date. Because of the bulk of the paper, some of the carrier boys delivered the Sunday supplement with the Saturday paper, which was the practice at one time. However, because the advertising in the Sunday paper costs more, some advertisers complained and the Employer therefore instructed the distributors that the Sunday supplement was to be delivered with the Sunday paper. The distributor gave these instructions to the carrier boys. When some of the carrier boys continued to deliver the Sunday supplement on Saturday, the Employer told the distributor that unless this stopped, it would deliver the supplement on Sunday morning and to discharge the carrier boy. Also, the Employer sent its district supervisor into the area to contact customers for the purpose of determining if the Sunday supplement was being delivered on Saturday or Sunday. In its letters and memos to the distributors the Employer lists the names of subscribers who received the Sunday supplement on Saturday and states, "Please correct this condition promptly." The Employer unilaterally established that for a daily insert only, the city distributor is to receive $5.00

and the motor route distributor $3.00. The franchise agreement makes no provision for this payment. The distributor attempted to negotiate for one cent per insert and the Employer refused to negotiate this with the distributor.

When the complaint clerk receives a call from within the city limits that a newspaper has not been delivered to a subscriber, the complaint clerk advises the complaint man who is an independent contractor, to deliver the paper to the subscriber and the distributor is charged 25 cents for each of these deliveries, which is not provided for in the contract.

Since 1947 the distributor has paid the expense of operating the distributorship. The Employer has not included the distributors in its social security, in workmen's compensation benefits, nor has it made deductions from the distributors' earnings for the tax withholding purposes. The distributor receives no vacation, holiday pay or other benefits from the Employer. If a distributor is absent for any reason, he obtains his own substitute. The Employer does not hold group meetings with the distributors. A few of the distributors have held other jobs. The Employer does not require the distributors to keep any special type record nor does it audit their books. However, the distributors are required periodically to submit a list of carrier boys and subscribers, and a list of expenses when the distributor seeks to have his wholesale rate decreased.

The Employer does send canvassers into the distributor's territory to seek new subscriptions. It has sent the district supervisors into the distributors' territory to investigate as to whether or not the Sunday supplement was being delivered on Saturday, and how much the distributor was charging the carrier boy for the paper.

In determining the status of persons alleged to be independent contractors, the Board has consistently held that the Act requires the application of right-of-control test. Where the one for whom the services are performed retains the right of control of the manner and means by which the result is to be accomplished, the relationship is one of employment. While on the other hand where the control is reserved only as to the results sought the relationship is that of independent contractors.[14] The resolution of this question depends on the facts of each case, and no one factor is determinative.

Some of the evidence such as the written agreement stating the distributors are independent contractors who control the manner and means of the distribution of the newspaper,[15] the distributor receives no vacation or other fringe benefits, they pay their own expenses in the operation of the distributorship, the Employer not making payroll deductions for tax withholding, or social security, workmen's compensation payment on behalf of the distributors indicates that the distributors are independent contractors. However, the record clearly shows that in accomplishing the distribution of its newspaper, an integral part of its operation, the Employer has maintained control over the distributors' earnings and the manner and means of accomplishing the results. The record shows that the distributors are not controlled by self-determined policy, persons investments

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[14] *News Syndicate Co., Inc.*, 164 NLRB No. 98; *Miami Herald Publishing Co., Inc.*, 162 NLRB No. 117; *Mister Softee of Louisiana, Inc.*, 162 NLRB No. 22; *Sacramento Union, Inc.*, 160 NLRB No. 17; *Postal Courier Express Inc.*, 129 NLRB 932; *P. F. Publishing Company*, 114 NLRB 60; and *Carter Publications Inc.*, 110 NLRB 59.

[15] It is not the precise terminology of the franchise agreement that determines the status of independent contractors. The issue is determined by the right-of-control test, stated hereinabove.

expenditures, and market conditions, but are controlled by the Employer. The Employer unilaterally establishes and controls the various sources of income of the distributors and minimizes the distributors' losses by granting of interest free loans, subsidies, changes in wholesale rates, replacing stolen or damaged bundles, and expense checks for the truck operations. Although the franchise agreement indicates that the distributor has a proprietary interest in the distributorship, the record established that the Employer controls the sale of the franchise and the distributor must first obtain its approval before a sale of a franchise is consummated. The Employer maintains control over the manner and means of the result to be accomplished as evidenced by its memos, instructions and orders for handling complaints, canvassing, investigating and stop orders etc. It is immaterial if the control is exercised by suggestion and request rather than by direct orders and is directed toward cooperative assistance in fulfillment of the agreement between the distributor and Employer.[16] As the Employer has maintained control over the manner and means of the distributors' income and the result to be accomplished, I find they are not independent contractors but employees of the Employer.[17]

The Employer also contends that some of the distributors are supervisors because they hire carrier boys, have contracts with other motor route men and hire part time drivers and station managers. It is clear, and the Employer does not contend otherwise, that the persons so engaged by the distributors are not employees of the Employer. Accordingly, as the distributor does not exercise any supervisory

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[16] *Buffalo Courier Express Inc.*, 129 NLRB 932, 936.

[17] *News Syndicate Co.*, 164 NLRB No. 69, and *Buffalo Courier Express Inc.*, 129 NLRB 932.

authority over any employees of the Employer, I find that in their employment relationship with the Employer which is the only relationship relevant here, the distributors are not supervisors within the meaning of the Act.[18]

In view of the foregoing, and the record as a whole, I find that the following employees of the Employer constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All city, motor route, street sales, country and suburban distributors employed by the Employer at Syracuse, and the central New York area, but excluding all other employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designed pay-

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[18] *News Syndicate Co., Inc.*, 164 NLRB No. 69, page 8.

roll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and who have been permanently replaced.[19] Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by Building Service Employees International Union, Local No. 200, AFL-CIO.

DATED at Buffalo, New York, this 19th day of July 1967.

s/ MERLE D. VINCENT, JR.
MERLE D. VINCENT, JR.,
Regional Director
National Labor Relations Board
Third Region
The 120 Building—120 Delaware Avenue
Buffalo, New York 14202

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[19] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, The 120 Building, 120 Delaware Avenue, Buffalo, New York 14202, on or before July 26, 1967. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-387

THE HERALD COMPANY, ET AL., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD,

and

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL #200, AFL-CIO

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICUS CURIAE THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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BRIEF FOR AMICUS CURIAE THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association files this brief as Amicus Curiae, urging that this Court review the decision of the United States Court of Appeals for the Second Circuit in this case affirming

the National Labor Relations Board's determination that petitioner's franchise newspaper distributors are employees within the meaning of section 2(3) of the Labor Management Relations Act, notwithstanding they have substantial proprietary interests in their business and they depend for income upon reselling, at a profit, newspapers, the title to which has passed to them. Your amicus files this brief in accordance with Rule 42(1) of the Rules of this Court and pursuant to the consents of the parties filed herewith.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a nonprofit, membership corporation organized and existing under the laws of the State of New York. Its membership consists of 1,054 daily newspapers, whose publications represent more than ninety percent of the total daily and Sunday newspaper circulation in the United States.

The Association's membership is vitally interested in the fundamental and underlying issue presented by this appeal: namely, whether under the facts and circumstances, the franchise distributors of the Petitioner are employees within the meaning of Section 2(3) of the Labor Management Relations Act. As petitioner points out in its petition for a writ of certiorari, the decisions of the Board and court below will have serious impact on franchise businesses in the United States. Deviating from the decisions in other circuits,[1] the tribunals below effectively would convert all fran-

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[1] *N.L.R.B.* v. *A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964); *Frito-Lay, Inc.* v. *N.L.R.B.*, 385 F.2d 180 (7th Cir. 1967); and *Carnation Co.* v. *N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970).

chisees into employees for the purposes of the Labor Management Relations Act. In an attempt to dilute the effect of these decisions were the Board to limit the application of this case to only newspaper publishers, the importance of the decisions becomes even more apparent, for the newspaper publishing business would stand on a grossly unequal footing with other businesses whose franchise relationship would remain undisturbed.

In distributing to the public their respective newspapers, a substantial number of the Association's members utilize independent distributors under agreements similar, if not in many cases almost identical, to the franchise agreements used by Petitioner with its distributors. Prompt, efficient, and economical distribution of a newspaper to the reading public is one keystone of a successful newspaper business. Many newspapers, plagued with myriad other labor problems, are seriously concerned with preserving the integrity of the economic and efficient franchise distribution agreements. To this end, this Association desires to assure its members that the use of such distribution arrangements accomplishes what both the publisher and distributor intended.

Background

Daily newspapers generally utilize four means of distributing to the reading public. One is by newspaper carrier boy; another is second class mail; third, news stand sales; and a fourth is by adult, independent distributors who purchase their newspapers from the publisher, own their distribution trucks, and operate on the profit derived from the difference between the amount billed to their customer-subscribers and their

cost of doing business.[2] It is with this last category, of course, that this appeal is concerned.

Where these independent distributors are used, considerations of economy and efficiency usually have led to the establishment of exclusive distribution areas or routes. In these areas, there ordinarily is no competition among adult carriers, although copies may and usually are sold by stores, honor racks, and street corner salesmen.

The largest percentage of most daily newspaper circulation consists of home deliveries. These home subscriptions constitute the most stable circulation element; and, for this reason, newspapers devote considerable effort to increasing these subscribers. New subscribers often telephone the newspaper directly as a result of the good will the publisher has established in the community over the years. Also, most daily newspapers conduct active subscription campaigns, including prizes and premiums, travel rewards, introductory offers, visual advertising, and direct telephone solicitation. Frequently, independent distributors are

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[2] Some newspapers do not utilize independent contractors in their distribution network. Instead, they directly employ "district managers", who in turn have many distribution employees under their control. In this structure, the distribution trucks are owned by the newspaper, and truck drivers and others in this network are employed by and under the supervision and control of the publisher. Although many factors are considered in deciding to adopt the independent contractor network or district manager network, the pivotal factors are cost and service. By eliminating the financial burden of vehicles, cost and maintenance, fringe benefits, payroll taxes, and supporting administrative staff, a newspaper may save considerable money in utilizing independent contractors in distributing the newspaper. It also may find that in its peculiar local community relationships the independent contractor method is best.

given premiums or bonuses for each new subscription they acquire. Ultimately, subscribers' lists are the result of long years of cultivation and financial investment by the publisher.

The traditional device of supply and demand is of little importance in setting the circulation price of a newspaper. Newspapers are a service business the income from which is dominated by advertising revenue. The market demand for newspapers will not sustain a circulation sales price even approximating publication costs. In fact, no daily newspaper publisher approaches a break-even point through circulation revenue.

At a circulation price of ten cents per copy, and disregarding soaring labor costs, most newspapers do not even cover their costs of newsprint and ink. For example, during the time period herein, a typical daily newspaper in the 240,000 circulation range spent $4.4 million on newsprint and ink, yet derived only $2.9 million from circulation revenue.[3] This financial reality has persisted since the advent of the large, daily newspaper in this country.[4] In fact, statistics accumulated by your amicus indicate that usually less than 25% of the gross revenues of daily newspapers were derived from circulation, whereas 75% or more of the revenues were generated by advertising.[5]

The profitability of the daily newspaper business primarily depends, then, on advertising; and the foun-

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[3] Editor & Publisher, April 1, 1967, at 14.

[4] Lee, The Daily Newspaper in America 273 (1937).

[5] See also, Editor & Publisher, April 1, 1967, at 14; *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 604 (1953).

dation upon which advertising sales rest is a stable circulation, nursed through an efficient and economical distribution system fitted to the local communities' needs. As pointed out above, circulation is basically a low income factor for newspapers. Thus, newspapers are vitally concerned with preserving the independent distribution system because it has been found by many newspapers to be the most economical and efficient method of getting the daily newspaper to the ultimate reader in its local community.

REASONS FOR GRANTING THE WRIT

Throughout the administrative and judicial litigation of this case, petitioner has sought to have vindicated its position that its franchise distributors are independent contractors and not employees embraced by Section 2(3) of the Act.[6]

In the Decision and Direction of Election, the Regional Director places great emphasis on alleged economic control exerted by Petitioner over its distributors. Indeed, the case turned on that point. Such reliance on economic control constituted reversable error, for, as the Ninth Circuit in *Carnation* held, evidence regarding economic controls is not *ipso facto* relevant to Section 2(3) determination.[7]

In the original Wagner Act, Congress did not specifically define the term employee. Because of this failure, The National Labor Relations Board in *Hearst Publications,* 28 N.L.R.B. 1006 (1941), held that

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[6] 29 U.S.C. § 152(3) (1964) which provides, in pertinent part: "When used in this subchapter . . . the term 'employee' . . . shall not include . . . any individual having the status of an independent contractor. . . ."

[7] *Carnation Co.* v. *N.L.R.B.,* 429 F.2d 1130, 1134 (9th Cir. 1970).

regular, full-time newspaper boys were employees within the meaning of the Act. Subsequently, this Court affirmed this determination and rejected the contention that by using the term employee, Congress intended to import the common law standards applied by the courts to distinguish employees from independent contractors. *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111 (1944). In so doing, this Court announced that:

> "the broad language of the Act's definitions . . . leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." Id. at 129.

Applying this test, this Court held that the *economic facts* of the relation, in this case, make it more nearly one of employment than of independent business enterprise. 322 U.S. at 128.

In 1947, Congress rejected the *Hearst* decision by amending Section 2(3) to exclude an independent contractor from the term employee.[8]

Explaining the difference between an employee and an independent contractor, Congress stated in the House Report accompanying the amendment bill:

> " 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' un-

[8] In H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947) Congress stated the reason *Hearst* was rejected:

> "Congress intended . . . that the Board give words not far fetched meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, [this amendment] excludes 'independent contractors' from the definition of 'employee'." (Explanation added.)

> dertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits." H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947).[9]

Following enactment of the Taft-Hartley amendments, the Board applied the "right of control" test in distinguishing between employees and independent contractors. This test, as indicated by the House Report, essentially turns on whether the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished or whether he controls only the result. Thus, the newspaper boys, vendors, distributors, and dealers who control the manner and means by which newspapers are sold and distributed are independent contractors and the Board, until recently, has so held.[10]

Beginning with *San Antonio Light Division, The Hearst Corp.*, 167 N.L.R.B. No. 99, 66 L.R.R.M. 1131 (1967), the Board departed from its customary method of applying the "right of control" test. Rather than

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[9] Moreover, in the House Conference Report, Congress emphasized that "independent contractors . . . can in no sense be considered to be employees . . ." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947).

[10] *See, e.g., Pultizer Publishing Co.*, 146 N.L.R.B. 302 (1964) (carriers); *Houston Chronicle Publishing Co.*, 140 N.L.R.B. 1267 (1963) (news vendors); *P.G. Publishing Co.*, 114 N.L.R.B. 60 (1955) (distributors); *Hearst Publishing Co.*, 102 N.L.R.B. 103 (1953) (news vendors); *Carter Publications, Inc.*, 100 N.L.R.B. 599 (1952) (dealers); *The Times Herald Printing Co.*, 94 N.L.R.B. 1785 (1951) (dealers).

balancing the factors showing newspaper control of sales and circulation against the factors showing vendor control as Regional Director had done in initially determining that the newspapers' vendors were independent contractors, the Board placed disproportionate significance on indicia concerning the entrepreneurial status of the vendors.

The Board's relapse into pre-amendment rationalization is graphically illustrated by the Board's decision in *Carnation Company,* 172 N.L.R.B. No. 215 (1968) where the Board cited the economic control exerted by the company over its franchise distributors as its reason for holding those distributors to be employees rather than independent contractors.[11]

On appeal, however, the Ninth Circuit correctly recognized that economic control is not the kind of control that is relevant to a decision whether a person is an independent contractor or an employee. *Carnation Company* v. *N.L.R.B.,* 429 F.2d 1130 (9th Cir. 1970). The Court correctly rejected the Board's position that economic control is relevant, recognizing that such economic control is present in a variety of typical franchising arrangements where the franchisees would not be considerd employees for NLRA purposes.

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[11] In *Carnation,* the Board cited in addition to others, certain control such as the limitation imposed by the Company on the distributor's right to assign his franchise; the company requirement that distributors' proceeds be deposited in a bank account jointly owned by the Company; the Company's right to immediately terminate the agreement upon the distributor's breach; the restriction on the distributor forbidding him to sell any competitive product; and the requirement that the distributor must advertise in accordance with the Company's directions.

In *Carnation,* the Board found that Carnation's wholesale distributors were employees under the Act. These distributors were granted exclusive licenses to sell Carnation's products in a particular geographic area. All distributors purchased their trucks and equipment from Carnation on conditional sales contracts, secured by an assignment of the distributor's accounts receivable. Distributors' revenue was required to be deposited in a joint bank account with Carnation, from which funds could be withdrawn only over the joint signatures of the distributor and a Carnation official.

The distributors in *Carnation Company* were not permitted to sell any competitive product. They were required to display on their trucks any advertising supplied by Carnation and also were required to paint their vehicles in a specific manner. If the distributor breached his agreement, Carnation had the right to terminate with only one day's notice. Upon termination, the distributor was obligated to resell his accounts receivable to Carnation. Carnation also had the right to take title to any vehicle upon which a balance was owing without the duty to account for the distributor's equity.

The Court recited general principles of agency as applicable in determining the status of Carnation's distributors and dismissed the Board "economic control" arguments by stating:

> "Most of the facts which the Board now asserts to be proof of Carnation's retention of the power to control its drivers are facts (economic rights and sanctions) which can be found in a variety of 'franchise' arrangements oriented toward brand-name protection and market penetration. In such

> cases there is no attempt to supervise the details of the work, and no assertion that the franchise holder is anything but an independent business man." *Carnation Company* v. *N.L.R.B.*, 429 F. 2d 1130, at 1134.

Economic control, therefore, should not have been the foundation upon which the Regional Director issued his Direction of Election. Regarding the other suggested foundation of his Direction decision, the Regional Director erred in applying extant administrative and judicial law to the facts surrounding the petitioner's alleged control of the distributor's means of accomplishing delivery of the newspaper.

The Board in *Pure Seal Dairy Company,* 135 N.L.R.B. 76 (1962) properly recognized the right of control test to determine whether one is an employee or independent contractor. Although the Board explicitly recognizes this test in many cases, it frustrates its application to the particular facts by only giving it lip service and insisting upon placing unfounded reliance on economic control. Notwithstanding, in *Pure Seal,* the Board properly pointed out that:

> "It is well established that in determining the status of persons alleged to be independent contractors, the Act requires the application of the 'right of control' test. Where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment. On the other hand, where control is reserved only as to the result sought, the relationship is that of independent contractor."[12] *Id.* at 79.

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[12] See also *Squirt-Nesbitt Bottling Corp.,* 130 N.L.R.B. 24 (1961); *Golden Age Dayton Corp.,* 124 N.L.R.B., 916 (1959).

In the instant case, the 1965 franchise agreement under which the distributors and Petitioner operated clearly demonstrates that Petitioner did not reserve any right to control the distributors in their day-to-day operations. The formal basis of the relationship between the publisher and the distributor is this written contract. It is apparent that this contract on its face does not create an employment relationship, and although this fact is not necessarily determinative, it is of substantial import.[13] Some of the highlights of that contract are: (1) The Herald Company assigned and transferred to the distributor the right to sell newspapers in a specified geographic area; (2) the distributor purchased papers from Petitioner; (3) the distributor agreed to promote the sale of the newspapers; (4) the distributor agreed to cooperate in effectuating any promotional program adopted by Petitioner; (5) the distributor maintains the right to sell any competing newspapers within his area; (6) and the distributor shall efficiently distribute the newspapers, including inserts and supplements, at places and times designated by Petitioner.

The distributor possesses the right to sell his distributorship, subject only to Petitioner's right of first refusal. Moreover, the agreement passes by operation of law to the distributor's heirs, should he not otherwise dispose of it.

The responsibility for acquiring and maintaining any vehicles the distributors deem necessary to carry

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[13] *See, e.g., N.L.R.B.* v. *A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964); *Site Oil Co. of Missouri* v. *N.L.R.B.*, 319 F.2d 86 (8th Cir. 1963); *United Insurance Co. of America* v. *N.L.R.B.*, 304 F.2d 86 (7th Cir. 1962); *National Van Lines, Inc.* v. *N.L.R.B.*, 273 F.2d 402 (7th Cir. 1960).

out their contractual obligations rests with them. Distributors possess the right to hire assistants and they assume the responsibility for any and all payroll taxes.

Those benefits normally afforded by Petitioner to its employees such as sick benefits, vacations, pensions, and insurance, are not extended to distributors. Petitioner makes no deduction for social security or income taxes, nor does it carry workmen's compensation insurance on its distributors.

Aside from alleged economic controls discussed *supra,* there is no finding of the Regional Director supporting his conclusion that Petitioner controlled the day-to-day operation of its distributors. It did control through the distribution contract the end result, *i.e.,* times and places of newspaper delivery. It did not, however, control how that end result was to be accomplished.

In this connection, the facts and circumstances herein involved are practically identical to those of *N.L.R.B.* v. *A. S. Abell Co.,* 327 F.2d 1 (4th Cir. 1964).[14] There, the Fourth Circuit held that distributors, operating under franchise agreements almost identical to the instant case, were independent contractors exempted by Section 2(3) of the Act. As in *Abell,* the essential business decisions concerning the operation of the route are largely within the discretion of the distributors herein involved. Like most independent businessmen, he may either reap the profits or bear the losses which result from his judgment. For example, exercising this discretion, he decides whether or not

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[14] See also, *Frito-Lay, Inc.* v. *N.L.R.B.,* 385 F.2d 180 (7th Cir. 1967); *United Insurance Co. of America* v. *N.L.R.B.,* 304 F.2d 86 (7th Cir. 1962).

to extend credit to his customers. He chooses whether to employ helpers and, if he does, he must decide upon the manner and amount of their compensation. The soundness of his judgment, his economy in vehicle maintenance and operation, and his employment of helpers or substitutes determine his profit.[15]

Also, as in *Abell,* Petitioner's distributors perform the actual physical delivery of newspapers *largely* uninhibited by Petitioner. The distributors, in *Abell,* were required to deliver the newspapers in tubes in rural areas and were permitted to discontinue delivery only because of a customer's nonpayment. As here, the *Abell* carriers maintained the accurate and current list of subscribers. Yet the Court held this "supervision" to be *de minimus* and to not affect the distributors' status as independent contractors.

In *Frito-Lay, Inc.* v. *N.L.R.B.,* 385 F.2d 180 (7th Cir. 1967), the distributors operated under agreements the essence of which was identical to the *Carnation, Abell,* and instant agreements, and the Seventh Circuit correctly noted that the *de minimis* controls exercised by the Company focused on the end result and hence did not control the employee-contractor determination. Yet the Board and Court below completely ignored this distinction by holding that such minor controls affecting the end result of the franchise arrangement were evidence of an employer-employee relationship. As Petitioner concludes in its petition, a franchise rela-

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[15] The Regional Director's Decision and Direction of Election appear to place some emphasis on subsidies received by distributors. It should be noted that some carriers in *Abell* received subsidies, but the Fourth Circuit apparently considered this fact of little import, treating it instead in a summary footnote recitation. *N.L.R.B.* v. *A. S. Abell Co.,* 327 F.2d at 7.

tionship can never be properly characterized as an employment contract merely because some control is retained by the franchisor.

CONCLUSION

For the reasons stated herein and in the petition for a writ of certiorari to the Second Circuit, it is respectfully urged that the petition be granted.

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448-336—71

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-387

THE HERALD COMPANY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a–17a) is reported at 444 F. 2d 430. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 18a–32a) are reported at 181 NLRB No. 62. The decision in the representation proceeding is set forth at Pet. App. 32a–52a.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a–2a) was entered on July 2, 1971. The petition for a writ of certiorari was filed on September 17, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly concluded that the petitioner's newspaper distributors are employees rather than independent contractors, and thus are protected by the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*), are Section 2(3) (Pet. 3), and:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. THE REPRESENTATION PROCEEDING

The Herald Company publishes The Herald Journal, a daily evening paper, and The Herald

American, a Sunday paper, in Syracuse, New York. It has more than 100 newspaper distributors, divided into various categories: "motor route" distributors, who, alone or with carrier boys, distribute papers to subscribers in rural areas; "city" distributors, who distribute papers to carrier boys for delivery to subscribers in the city of Syracuse and the immediate surrounding area; "street sales" distributors, who deliver newspapers to news dealers such as drug stores and newstand operators, within the city; and "suburban" and "country" distributors, who deliver newspapers outside of the areas of the city and motor route distributors (Pet. App. 34a–35a; A. 272–277, 286–287, 295–297.) [1] In June 1966, Building Service Employees, International Union, Local No. 200, AFL–CIO, filed a representation petition with the Board's Regional Director seeking to represent the Company's distributors (A. 1906).

The evidence at the hearing showed that in 1947 the Company initiated a system for the distribution of its newspapers, whereby, on payment of $1.00, its former district managers were permitted to execute a "franchise agreement" for a term of 3 to 5 years. The territory of the distributor was established by the Company and was substantially the same as that serviced as district manager. The work performed by the distributor also remained substantially the same. (Pet. App. 36a–37a; A. 295–298, 957–961, 1931–1935.)

[1] "Pet. App." refers to the appendix to the petition for certiorari; "A." refers to the 4 volume appendix, and "S.A." to the supplemental appendix, in the court of appeals, copies of which have been lodged with the Clerk of this Court.

This and all subsequent agreements were drawn up by the Company without negotiation with the distributors (Pet. App. 37a; A. 299–301; 315–321, 322–324, 326, 336–342, 374–375, 408–410, 1931–1950).

The most recent contract, drafted by the Company in 1965, gives the distributor the right "to sell and distribute the newspapers" of the Company within a specified territory for a definite time "[s]o long as the distributor shall fully perform the obligations" under his contract (Pet. App. 38a; A. 1907, 2345–2352 (Section 1)). These "obligations" include purchasing a particular quantity of papers at a set price, picking up papers at places and times designated by the Company, submitting circulation reports, and participating in Company promotional campaigns (Pet. App. 38a–39a; A. 2345–2352 (Sections 2, 4, 5, 8, 12)).

The contract establishes the resale rate which the distributor is allowed to charge his carriers and others (Pet. App. 38a; A. 2345–2352, Section 4) and "wholesale price ceilings," which have the effect of increasing the price of the papers to the distributor when his purchases exceed a certain limit (Pet. App. 40a–41a; A.315–320, 1941–1942 (Section 4)). The Company provides distributors with promotion money.[2] If a distributor needs to buy a truck the company will pro-

[2] This money is used to encourage increased circulation and subscriptions, and also to provide the distributor with supplemental income. The Company determines the number and type of promotional activities, the amounts of prize money, and which distributors are entitled to participate. (Pet. App. 41a; A. 310–311, 656–666, 872, 873–878, 1174–1175, 1248–1251, 1252–1257, 1261.)

vide an interest-free loan (Pet. App. 42a; A. 335–336) and pay the distributor a fee for the use of the truck in hauling papers (Pet. App. 42a; A. 281–282, 333–336; S.A. 29–41). The Company pays distributors direct subsidies to compensate for rising operating costs or loss of circulation (Pet. App. 41a, 43a; A. 822–824, 1171–1172; S.A. 25–28). The Company also replaces distributors' papers which are damaged, lost or stolen, and accepts "returns" from street sales distributors (Pet. App. 43a; A. 333–334, 348, 372–373, 1957).[3]

Under the agreement, the distributor must give the Company "30 days' written notice" of intent to "sell, assign or transfer" the distributorship, and supply the name and address of the buyer, the intended purchase price, and the terms and conditions of the buyer's offer; he further agrees to "assign and transfer" all rights in the distributorship to the Company if it elects within the 30-day period to purchase such rights (Pet. App. 39a; A. 1907, 2345–2352, Section 10).

Before a transfer of the distributorship occurs, the Company usually screens the prospective distributor and the terms of the offer. The documents for transfer are normally prepared by the Company. The seller signs a release to the Company, and the Com-

[3] Although the distributor does the actual hiring of the carriers, the Company runs advertisements for them, specifying certain eligibility requirements. It also supplies bonding forms for the carriers, relays instructions directly to them, sets the distributor's resale rate to the carriers, and, on occasion, has insisted that certain carriers be transferred, terminated, or discharged. (A. 365–366, 383, 1958, 2052.)

pany then executes a contract with the new distributor. (Pet. App. 44a–45a; A. 303–311, 380–381, 628–640, 1031–1032, 1088–1090, 1170–1171, 2008.)[4] When the Company looks favorably upon a prospective sale or transfer of a distributorship, it has adjusted wholesale rates in the contract for the purchaser, helped to finance acquisition of the distributorship, granted additional subsidies, promised additional promotion money or adjustments to maintain a profitable operation, and otherwise assisted in the transfer (Pet. App. 44a; A. 1182–1191, 303–314, 2008). The Company has also allowed distributors' contracts to lapse at their termination date, after which the Company has selected a buyer, offered the territory to him at a price established by the Company, and then offered the proceeds to the former distributor less the amount which the Company has expended in operating the distributorship in the meantime (Pet. App. 45a; A. 825, 1125–1129, 970–977, 1302–1303, 2063, 1025–1026, 1033–1035, 1104–1108).

Based on these facts and the additional evidence of control in the extensive record, the Regional Director, applying the "right-of-control" test, concluded that the distributors were "employees" under Section 2(3) of the Act—rather than independent contractors—and that they constituted an appropriate unit for collective bargaining (Pet. App. 50a–51a). The Director explained (Pet. App. 49a–50a):

[4] When the distributorship contract terminates, the customer lists become the property of the Company, and are given to a new distributor (Pet. App. 45a; A. 2345–2352 (Sections 10 and 12)).

> * * * the record clearly shows that in accomplishing the distribution of its newspaper, an integral part of its operation, the Employer has maintained control over the distributors' earnings and the manner and means of accomplishing the results. * * * The Employer unilaterally establishes and controls the various sources of income of the distributors and minimizes the distributors' losses by granting of interest free loans, subsidies, changes in wholesale rates, replacing stolen or damaged bundles, and expense checks for the truck operations. Although the franchise agreement indicates that the distributor has a proprietary interest in the distributorship, the record established that the Employer controls the sale of the franchise and the distributor must first obtain its approval before a sale of the franchise is consummated. The Employer maintains control over the manner and means of the result to be accomplished as evidenced by its memos, instructions and orders for handling complaints, canvassing, investigating and stop orders etc.* * *

The Board denied the Company's request for review on the ground that it raised "no substantial issues warranting review" (A. 81). The Union won the ensuing election (A. 199), and was ultimately certified as the representative of the Company's distributors (Pet. App. 30a).

B. THE SUBSEQUENT PROCEEDINGS

After certification, the Union filed unfair labor practice charges (Pet. App. 5a). The Board found that the Company violated Section 8(a)(5) and (1) of the Act

by refusing to recognize and bargain with the Union based on the certification (Pet. App. 20a–22a).[5] The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by discharging 12 distributors and altering the distributors' economic benefits in an effort to discourage union activities. Finally, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees about their union sympathies and activities, threatening them with loss of benefits and discharge, promising them benefits, and engaging in other forms of restraint and coercion (Pet. App. 5a; A. 242–244, 251–255).[6]

The Board ordered the Company, *inter alia*, to bargain with the Union; to reinstate the 12 distributors "or renew, as circumstances require" their agreements; and to make whole those distributors who "suffered loss of subsidies, bonuses, promotion moneys or other emoluments of value" as a result of the Company's discriminatory action (Pet. App. 22a–23a; A. 256–260). The court of appeals sustained the Board's finding that the distributors are employees, as well as its other findings, and enforced its order (Pet. App. 3a–17a).

ARGUMENT

In *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254, 256, this Court held that

[5] In reaching this conclusion, the Board, upon reexamination of the entire record in the representation proceeding, reaffirmed the prior determination that the distributors are employees within the meaning of the Act (Pet. App. 19a, n. 2).

[6] The Company does not now contest these additional unfair labor practice findings.

"general agency principles" are to be used in distinguishing between employees and independent contractors under the Act[7] and that the reviewing court may not displace "'the Board's choice between two fairly conflicting views'" (*id.* at 260). In the present case, the Board, applying traditional agency criteria, found that the Company exercised substantial control over the distributors' performance of their duties, their incomes, and the value of their distributorships, and that the distributors thus were employees, rather than independent contractors. The court of appeals held that the Board's finding was supported by substantial evidence and that "the very least that can be said for the Board's decision is that it was 'a choice between two fairly conflicting views'" (Pet. App. 11a–12a). Petitioner's challenge to the Board's finding presents, at the most, a factual issue which does not warrant further review.

Petitioner contends, however, that the present case is different from the typical employee-independent contractor situation because the distributors are "franchisees," who own their "own business which can be alienated at will," and who "purchase papers from petitioner, taking title to them and assuming the risk of their loss" (Pet. 17–19). Despite any label the Company chose to put on the relationship, under the facts of this case, the distributors' risk of loss and ability to alienate their interests as well as their

[7] Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor."

direction and control are minimal. The Company compensates the distributors for lost, stolen, or damaged papers; pays them substantial subsidies in addition to the proceeds they receive from the sale of papers; and adjusts the wholesale price of the papers to control each distributor's income. Although the distributor may sell his interest in the distributorship, its value is dependent on the Company's willingness to continue in effect the various subsidies and to renew the contract; the Company thereby maintains effective control over the disposal of the distributorships. In short, the situation which petitioner depicts and labels as a franchise is not supported by the recorded facts of this case.[8]

[8] Similarly, the cases relied on by petitioner (Pet. 33–35) are factually distinguishable. In *National Labor Relations Board* v. *Abell Co.*, 327 F. 2d 1 (C.A. 4), the distributors bore the risk of loss, their income was not dependent on factors within the control of the publisher, and they operated "largely uninhibited by publisher control." *Id.*, at 7. In *Frito-Lay, Inc.* v. *National Labor Relations Board*, 385 F. 2d 180 (C.A. 7), the distributors' "profits depend[ed] entirely upon the difference between the purchase and selling price of the Company's products," and they were free to establish their own resale prices. *Id.*, at 186. The same was true in *Carnation Co.* v. *National Labor Relations Board*, 429 F. 2d 1130, 1132 (C.A. 9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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